Dickerson-Chapman, Inc. *and* International Union of Operating Engineers, Local Union No. 624, AFL–CIO. Cases 15–CA–11052-1, 15–CA–11160, and 15–CA–11294–1

March 1, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND TRUESDALE

On May 21, 1993, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dickerson-Chapman, Inc., Jackson, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Lyn R. Buckley, Esq., for the General Counsel.
R. Pepper Crutcher Jr. and *Armin J. Moeller Jr., Esqs.*, both of Jackson, Mississippi, for the Respondent.
John L. Maxey II, Esq. and *John L. Quinn, Esq.*, both of Jackson, Mississippi, for the Union.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. These consolidated cases were heard before me in Jackson, Mississippi, on 11 hearing days between July 23, 1990, and February 8, 1991. The charge in Case 15–CA–11052–1 was filed against Respondent Dickerson-Chapman, Inc. (the Company) by International Union of Operating Engineers, AFL–CIO, Local 624 (the Union) on November 9, 1989, and amended on February 26, 1990; the complaint in that case was issued on February 26, 1990.[1] The charge in Case 15–CA–11160 was filed against the Company by the Union on March 1, 1990; the consolidated complaint in these two cases was issued on April 20, 1990, and was amended on July 24, 1990. The charge in Case 15–CA–11294–1 was filed on July 25, 1990, and amended on August 9 and September 28, 1990; the complaint in that case was issued on October 15, 1990, and amended on January 7 and 10, 1991. All of these cases were consolidated on November 28, 1990.

As amended, the April 1990 consolidated complaint alleges, in part, that about November 2, 1989, the Company violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by granting pay raises to all employees, and by ''promoting'' ''employees'' Benjamin Alford (who quit in the spring of 1990), Kenneth Easterling (who died about January 1990), Odess Jones, Wycliff McPherson, James Spiller, and 16 others,[2] all to discourage union activity. The April 1990 complaint further alleges that the Company violated Section 8(a)(1) and (3) of the Act by discharging, to discourage union activity, ''employees'' Odess Jones and McPherson about November 3, 1989, and by discharging ''employee'' Spiller about February 29, 1990. In addition, the April 1990 complaint alleges that the Company violated Section 8(a)(1) of the Act by interrogating ''employees'' re-

[1] The Respondent has excepted to the judge's rulings at the trial to exclude certain evidence which the Respondent claims is relevant to the supervisory status of its foremen and crew leaders, and moves to reopen the record so that it can be introduced. The proferred evidence includes alleged ''summaries'' of payroll records which the Respondent admits were prepared in preparation for trial based on the memory of Vice President Bryan Wampler, and employee testimony offered in the rebuttal stage, which the judge found to be outside the scope of the General Counsel's direct examination. Based on a careful review of the record and exceptions, we find no reason to reverse the judge's rulings and we deny the Respondent's motion to reopen the record.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. II,E,2,c,5,a, par. 3 of the decision, the judge inadvertently omitted the name of discriminatee George Jones from the list of employees to whom the Respondent unlawfully issued job descriptions on July 2, 1990.

[3] In finding that the Respondent violated Sec. 8(a)(3) and (1) when it promoted certain employees in November 1989, we do not rely on the judge's suggestion that the Respondent's refusal to bargain with the Union, at least until July 1992, when the court of appeals enforced our bargaining order, constitutes evidence of animus.

In agreeing with the judge that the Respondent violated Sec. 8(a)(5) and (1) of the Act by laying off and severely reducing the hours of unit employees without providing the Union notice and an opportunity to bargain, Chairman Stephens finds it unnecessary to rely on *Specialized Living Center*, 286 NLRB 511 (1987), enfd. 879 F.2d 1442 (7th Cir. 1989), a case in which he did not participate and which he regards as factually distinguishable. In the Chairman's view, the Respondent did not satisfy its obligations under Sec. 8(a)(5) because it was willing to bargain on a piecemeal basis only, i.e., it limited its offer to bargain to the question of who was to be laid off and refused the Union's request to discuss all other issues. See the cases cited in fn. 83 of the judge's decision.

[1] The formal papers include (a) a charge assigned the docket number 15–CA–11052–1, and filed on November 9, 1989, which alleges, inter alia, the unlawful discharge of Odess Jones; (b) a charge assigned the docket number 15–CA–11052–2, also filed on November 9, 1989, which alleges, inter alia, the unlawful discharge of Wycliff McPherson; and (c) an amended charge, with the docket number 15–CA–11052–1, and filed on February 26, 1990, which alleges, inter alia, the unlawful discharge of Odess Jones and McPherson. The subsequent formal papers do not include the docket number 15–CA–11052–2.

[2] William Burkes, J. D. Freeman, James Hicks, Linden Hill, Earl Howard, Lee Field Johnson, Isaiah McDonald, Harvey Miner, Lee Earl Moore, Tommy Obie, Jewel Owens, Elijah Pitchford, Joe L. Smith, Clifford Stafford, Robert Taylor, and Vernon Wilson Jr. Burkes is sometimes referred to in the record as Burks; his signature is compatible with either spelling. The record contains various spellings of Isaiah McDonald's first name, which is illegible from his signature, and sometimes spells his last name as MacDonald, which differs from his signature.

garding union activity. The October 1990 complaint, as amended, alleges that as to the 16 ''employees'' named, supra, footnote 2, plus ''employees'' Ronald Johnson, George Jones, Tommie Lee Jones, Charles Luckett, James A. Wade, and Otha Lee Wilson, the Company violated Section 8(a)(1), (3), and (5) of the Act about July 2, 1990, by granting them pay raises, and increasing their duties, to discourage union activity and without giving the Union prior notice and an opportunity to bargain. The October 1990 complaint, as amended, also alleges that the Company violated Section (8)(5) and (1) of the Act by (1) between July 2 and 6, 1990, changing the job descriptions of the 22 ''employees'' described in the preceding sentence, implementing new safety regulations, and issuing a new safety manual; and (2) about August 1, 1990, laying off or severely cutting back the hours of employees, all without giving the Union notice and an opportunity to bargain. The record in the representation proceeding which underlies the (8)(a)(5) allegations was received in evidence before me.[3]

On the entire record, including the demeanor of the witnesses who testified before me, and after due consideration of the briefs filed by counsel for the General Counsel (the General Counsel) and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company is a Mississippi corporation with a facility in Jackson, Mississippi, where it is engaged as a contractor in the construction industry. During the 12-month periods preceding January 31 and August 31, 1990, the Company provided services in excess of $50,000 within Mississippi to South Central Bell Telephone Company, a Division of Bell South Corporation (South Central Bell), a Georgia corporation with an office and place of business in Jackson, Mississippi, which is a public utility and provides telephone communication services in various States, including Mississippi and Louisiana. During the 12-month periods ending on January 31 and August 31, 1990, South Central Bell derived gross revenues in excess of $1 million. In the course and conduct of its business operations, South Central Bell annually purchased and received at its Jackson, Mississippi facility products, goods, and materials valued in excess of $50,000 directly from points outside Mississippi. I find that, as the Company concedes, the Company is engaged in commerce within the meaning of the Act, and that exercise of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Sequence of Events; Procedural History*

A union organizational campaign began among the Company's employees about October 15, 1989. On October 31, 1989, the Union filed with the Board's Regional Office in New Orleans, Louisiana, a representation petition seeking certification as the representative of the Company's operational services personnel, including operators, laborers, and truckdrivers. Laying to one side the Company's contention that all the workers named in both complaints have been statutory supervisors at all relevant times, it appears to be undisputed that they were within the requested unit.

About 2 days after the Union filed its representation petition, the Company at least allegedly ''promoted'' all the 21 workers named supra at footnote 2 and attached text, and gave wage increases to them and to most of the other workers whom the Union wanted to include in the unit; the General Counsel contends that the foregoing actions violated Section 8(a)(1) and (3) of the Act because, allegedly, the ''promotions'' were effected in an attempt to remove the affected individuals from the bargaining unit, and the wage increases were granted, allegedly, for the purpose of discouraging union activity. About the following day, the Company discharged two of the ''promoted'' individuals—Odess Jones and McPherson—admittedly because of their union activity.

A hearing on the Union's representation petition was held between November 28 and 30, 1989. By letter to the Regional Director dated December 1, 1989, company counsel challenged the sufficiency of the Union's showing of interest, on the ground that Odess Jones and McPherson had engaged in prounion solicitation and were allegedly supervisors. On February 16, 1990, the Regional Director issued a Decision and Direction of Election in which he included in the unit, as employees, all of the individuals named supra at footnote 2 and attached text. Among these individuals was Spiller, whom Respondent discharged on February 28, 1990, admittedly for union activity.

Over date of March 1, 1990, the Company filed a request for review of the Regional Director's Decision and Direction of Election. Attached to this request was, inter alia, an affidavit by Company Office Manager Bryan Wampler which stated that after the close of the representation case hearing, certain incidents had taken place which allegedly tended to show that certain individuals whom the Regional Director had found to be employees were in fact statutory supervisors; these individuals included Earl Howard, Isaiah McDonald, Tommy Obie, and Joe L. Smith. On March 13, 1990, the Board issued an Order which reads, in part:

> Employer's Request for Review of the Regional Director's Decision and Director of Election raises a substantial issue only with respect to the supervisory status of conduit foreman Lee Earl Moore and cable foremen James Spiller, Clifford Stafford, Jewel Owens, William Burkes, and Linden Hill. The Board concludes, however, that this issue can best be resolved through the challenge procedure. Accordingly, the Decision is amended to permit the above-named individuals to vote by challenged ballot, and the Request for Review is denied in this and all other respects. With respect to the factual assertions contained in the post-Decision declaration of Bryan E. Wampler . . . the Board notes that to the extent those assertions involve post-hearing events, they may be raised through the challenge procedure as changed circumstances.

[3] Likely, this representation case record was in any event part of the instant record by virtue of Sec. 9(d) of the Act. The Company's exhibits in the representation case bear the same exhibit numbers in the unfair labor practice record.

The election was held on March 14, 1990. The tally of ballots showed 38 votes for the Union, 9 against the Union, and 27 challenged ballots, which were insufficient in number to affect the result; the Company avers that it challenged all foreman and crew leader ballots.[4] On May 9, 1990, the Acting Regional Director overruled the Company's objections to the election, and certified the Union as the representative of the employees in the voting unit which had previously been found appropriate.

By letter dated May 14, 1990, the Union requested a meeting with the Company ''to discuss contract negotiations''; the Board found this letter to constitute a request to bargain. *Dickerson-Chapman, Inc*., 301 NLRB 267, 268 (1991), enfd. 964 F.2d 493 (5th Cir. 1992) (*Dickerson-Chapman I*). By letter dated May 22, 1990, the Company enclosed a copy of its request for review of the Regional Director's action, and declined the Union's ''request for negotiations.'' The October 1990 complaint alleges that about July 2, 1990, the Company violated Section 8(a)(5) and (1) by unilaterally granting pay raises to ''employees,'' increasing their duties, changing their job descriptions, implementing new safety regulations, and issuing a new safety manual; some of such action is also alleged to violate Section 8(a)(3). On July 17, 1990, the Board denied review of the Acting Regional Director's supplemental decision and certification of representatives. The Board's Order denying review stated, in part, that as to one of these objections, ''we deny review solely on the basis that our prior order of 3/13/90 denied review of the [Regional Director's] finding that Odess Jones and Wycliff McPherson were not statutory supervisors''; this objection had alleged that Jones and McPherson had solicited the Union's showing of interest in support of its petition.

By letter dated and hand delivered on July 24, 1990, the Union again requested a meeting with the Company ''to discuss contract negotiations''; the Board and the court of appeals found this letter to constitute a request to bargain. *Dickerson-Chapman I*, supra, 301 NLRB at 268, 964 F.2d at 495. By letter dated July 31, 1990, company counsel stated, inter alia, that the Company ''declines your request [for a meeting to discuss contract negotiations], because it believes that the National Labor Relations Board erroneously certified your union . . . and, therefore, that it has no legal obligation to bargain with your union. [The Company] also declines to accept that obligation voluntarily.''[5] The Board and the court of appeals found this letter to constitute a refusal to bargain. *Dickerson-Chapman I*, supra, 301 NLRB at 268, 964 F.2d at 495. The October 1990 complaint alleges that about August 1, 1990, the Company violated Section 8(a)(5) and (1) of the Act by laying off or substantially curtailing the hours of employees without giving the Union notice and an opportunity to bargain.

Meanwhile, on July 27, 1990, the Company filed with the Regional Office a petition (docketed as Case 15–AC–53) to amend the Union's certification, and another petition (docketed as Case 15–UC–123) to clarify the certification. Both petitions sought a determination that individuals to whom the Company had assigned certain job classifications were supervisors and, therefore, not included in the certified unit.[6] On September 20, 1990, the Regional Director dismissed both petitions. He dismissed the petition to amend the certification, on the ground that a unit clarification petition was the most appropriate means by which to seek the determination requested by the Company. He dismissed the petition to clarify the certification, on the ground that the unit placement of the individuals whom the petition alleged to be supervisors involved disputed issues to be resolved in the complaints (including a then forthcoming complaint) before me and in a then forthcoming complaint in Case 15–CA–11294–2 (the Board docket number of the case which resulted in the January 1991 bargaining order enforced by the Fifth Circuit on July 1, 1992, in *Dickerson-Chapman I*, 301 NLRB 267, 964 F.2d 493). Requests dated September 28, 1990, to review both dismissals were filed by the Company with the Board.

On October 15, 1990, the General Counsel issued a complaint in Case 15–CA–11294–2, alleging that the Company's refusal to honor the Union's certification violated Section 8(a)(5) and (1) of the Act.[7] On December 28, 1990, the Board issued an Order affirming the Regional Director's dismissal of the petition to amend the certification, on the ground that the Company's request for review raised no substantial issue warranting reversal. On December 26, 1990, the Board issued a similar Order with respect to the petition to clarify the certification; the Order added, however, that ''should the pending unfair labor practice proceedings fail to resolve the issues raised by the instant petition, any party may file a new unit clarification petition, if otherwise appropriate.''

On January 22, 1991, the Board granted the General Counsel's Motion for Summary Judgment in Case 15–CA–11294–2, and ordered the Company to bargain with the Union as the representative of the certified unit. *Dickerson-Chapman I*, supra. On July 1, 1992, the Order was enforced by the United States Court of Appeals for the Fifth Circuit. *NLRB v. Dickerson-Chapman, Inc*., 964 F.2d 493. Among other things, the court approved the Board's finding that Odess Jones, McPherson, and the individuals listed in the margin were statutory employees.[8] In addition, after noting that the Board had found a substantial question as to the status of William Burkes, Linden Hill, Isaiah McDonald, Lee Earl Moore, Jewel Owens, James Spiller, and Clifford Stafford, the court stated (964 F.2d at 500, footnote omitted):

> The Board did not abuse its discretion by postponing its decision regarding the individual status of [these] seven named foremen and allowing them to vote subject to challenge . . . . Because [the Company] unlawfully refused to bargain with an appropriate unit that was duly

[4] See p. 2 of the Company's September 28, 1990 request for review of the Regional Director's dismissal of a unit clarification petition filed after the Union's certification.

[5] Other portions of the letter are discussed, infra, part II,D,E,6.

[6] Exclusion was sought, as supervisors, of all conduit foremen, cable foremen, boring crew foremen, pole foremen, service wire foremen, and crew leaders.

[7] This complaint was based upon the same charge as the October 15, 1990 complaint before me.

[8] Ben Alford, Kenneth Easterling, J. D. Freeman, James Hicks, Earl Howard, Lee Field Johnson, Harvey Miner, Tommy Obie, Elijah Pitchford, Joe L. Smith, Robert Taylor, James Wade, and Vernon Wilson Jr. References to Vernon Wilson in *Dickerson-Chapman I* are directed to Vernon Wilson Jr. The record also contains various references to his father, the late Vernon Wilson Sr., who worked for the Company before his retirement.

certified, we grant enforcement to the Board's order. In doing so, however, we hold that the seven unresolved foremen are not included in the enforcement order because the Board did not make a determination that they were not supervisors. That decision is left to another day and to another forum.

In view of the court's statements with respect to these seven individuals, I deny the Company's motion dated March 12, 1992, after the close of the hearing before me, to dismiss the complaint as to them on the ground that during the oral argument before the court on March 10, 1992, in *Dickerson-Chapman I*, Board counsel allegedly ''stipulated . . . that these gentlemen are excluded from the certified unit, and that [the Company] has had no duty to bargain with respect to their terms and conditions of employment.''[9]

On July 28, 1992, the court of appeals entered a judgment in *Dickerson-Chapman I* as proposed by the Company. That judgment read, in part:

> The Court having held in its opinion that seven foremen [Lee Earl Moore, William Burkes, Isaiah MacDonald, Linden Hill, Clifford Stafford, Jewel Owens, and James Spiller] are not included in the unit described in paragraph (a) [the unit as set forth in the May 9, 1990, certification], this Judgment does not require Dickerson-Chapman, Inc. to bargain with [the Union] concerning their terms and conditions of employment, or to refrain from, or to take, any other action with respect to them.[10]

B. *The Alleged Preelection Discrimination and Unlawful Interrogation*

1. The beginning of union activity; the drafting and distribution of job descriptions; and the allegedly unlawful November 1989 wage increases

On October 15, 1989, Wycliff McPherson, who at that time worked for the Company, telephoned the Union and arranged a meeting among the Company's workers on October 21. McPherson told about 40 other workers about it, and all of them attended. After initially gathering in the Company's parking lot, these 40 workers proceeded to a nearby churchyard and all signed a paper for organizing the Union. Among those who attended this meeting were McPherson, Odess Jones, and Spiller.

On October 29, 1989, at a second union meeting, the workers present decided that they wanted the ''union man'' to represent them. The ''union man'' said that an organizing committee was needed. McPherson, Odess Jones, and Obie agreed to serve on this committee. The ''union man'' told them to advise their supervisor the next day that they were all on the committee. On the following day, October 30, McPherson and Obie approached then field superintendent Henry Berry,[11] an admitted supervisor, and started to tell him about the organizing committee. Berry thereupon called out to Executive Vice President/General Manager James M. (Bo) Stewart, an admitted supervisor who is the highest ranking company official at the Jackson facility and whom Odess Jones was telling about the organizing committee, ''you need to hear this''; and brought over McPherson and Obie. After Berry and Stewart had been told about these three workers' membership on the organizing committee, Stewart said, ''Okay.''

Immediately after learning about the Union's organizing campaign, admitted Supervisor Bryan Wampler (whose title is office manager but who is in charge of the Company's personnel matters) consulted an attorney for advice on how to fight the Union and how to keep it out. Thereafter, Wampler and this attorney drew up at least purported job descriptions captioned ''Cable Foreman,'' ''Service Wire Foreman,'' ''Conduit Foreman,'' and ''Pole Foreman,'' on which the Company has relied to support its contention that a number of workers—including McPherson, Odess Jones, and Spiller—were statutory supervisors. Wampler had been working for the Company for about 10 years, the last 6 of them in his present position. He testified that until these job descriptions were drafted, he had never seen, or generated, any job descriptions at the Company. On various dates between October 31 and November 2, 1989, inclusive, Wampler or Stewart presented one of these job descriptions, for the worker's signature, to the 18 workers listed in the margin; the April 1990 complaint alleges that the Company violated Section 8(a)(3) and (1) by ''promoting'' these 18.[12] The April

[9] By letter to me (with copies to company counsel) dated June 4, 1992, the General Counsel denied that during the oral argument Board counsel made any such ''stipulation.'' Rule 34.7 of the Fifth Circuit's Local Rules states:

> Oral arguments in all cases are tape recorded for the exclusive use of the Court. Copies of the tapes or transcripts thereof cannot be prepared and furnished to counsel or the parties nor will counsel be permitted to listen to the tape. However, with the advance approval of the Court, counsel may arrange at their own expense for a qualified court reporter to be present to record and transcribe the oral argument.

On April 2, 1992, the court denied company counsel's postargument motion, dated March 24, 1992, for leave to permit transcription of portions of the oral argument.

[10] Although requiring the posting of ''the attached notice marked Appendix,'' the Company's proposed judgment in the Board's formal file includes no attached notice. I infer that the Judgment calls for posting of the notice set forth in the Board's Order, which notice does not specifically name any of these individuals.

[11] Also referred to in the record as Howard Berry and Arthur Berry.

[12] Ben Alford, cable foreman; William Burkes, cable foreman; Kenneth Easterling, pole foreman; J. D. Freeman, service wire foreman; James Hicks, pole foreman; Linden Hill, cable foreman; Lee Field Johnson, cable foreman, he refused to sign; Odess Jones, service wire foreman, he refused to sign, see, infra, part II,B,2; Isaiah McDonald, cable foreman; Wycliff McPherson, cable foreman, he attempted to retract his signature, see, infra, part II,B,3; Harvey Miner, service wire foreman; Lee Earl Moore, conduit foreman; Tommy Obie, cable foreman; Jewel Owens, cable foreman; James Spiller, cable foreman, he refused to sign, see, infra, part II,B,4; Clifford Stafford, cable foreman; Robert Taylor, service wire foreman; and Vernon Wilson Jr., conduit foreman, he refused to sign. Vernon Wilson Jr. refused to sign the job description for the stated reason that Stewart and Wampler said they could not give him a copy; Wampler testified at the representation case hearing that Wilson ''would not commit in any form'' that the job description described his duties, and testified before me that Wilson did not contest that these were his job duties. Lee Field Johnson refused requests by Berry, Ainsworth, and Wampler. There is no evidence that Johnson refused to sign for the stated reason that the job description was inaccurate. I find it unnecessary to determine whether he gave inability to un-

1990 complaint also alleges that about the same date, the Company unlawfully ''promoted'' three workers who were not given written job descriptions for their signature, and all of whom were found in the prior proceeding to occupy employee status—namely, Earl Howard, Elijah Pitchford, and Joe L. Smith, all of whom are described by the Company as crew leaders.

Wampler testified that ''normally'' the employees received annual raises, and ''Normally, they would be reviewed for a raise in May to June area.'' Such raises had been given in late June 1985, in mid-July 1986, in late July 1987, and on an undisclosed date in 1988. Wampler testified that the timing of the 1989 raises had nothing to do with the appearance of union activity, and that in 1989 they had not been given until November because, when renewing its insurance in June 1989, the Company had received a ''massive'' increase, the insurance company expected the Company to pay these premiums as quickly as possible, and the Company had made these payments in 4 monthly installments between July 1 and October 1989. In the fall of 1989, at the last employee meeting before the beginning of the union activity in mid-October 1989, Isaiah McDonald, who had received annual raises beginning in at least June 1985, asked Company Vice President Stewart when the workers would receive a raise. Stewart replied that the workers had not earned a raise, that they were not working hard enough, and that they should be glad to have a job. Almost all the Company's workers received pay raises, reflected in the paychecks they received on November 3, 1989, and effective about October 21 or 22 (after the union activity began), which varied between 10 cents and $1.05 an hour. Raises given before 1989 were generally much lower than those given in November 1989. Moreover, unlike the raises given in 1985–1988, the 1989 raises included about 32 of the approximately 38 workers hired within the preceding year.

2. The allegedly unlawful interrogation and discharge of Odess Jones

About November 2, 1989, Wampler and Stewart drove to the jobsite where Odess Jones was then working. Stewart got out of the car, and told Jones to get into the car with Wampler. When Jones got into the car, Wampler gave him a two-page document headed ''Service Wire Foreman.'' This document began with the statement that a service wire foreman ''directly supervises a laborer on service wire work orders''; states that ''his duties include'' 22 items, many of which are (at least arguably) supervisory in nature; and calls for a signature over the words ''Service Wire Foreman.'' Wampler said that Jones had to sign the paper, stated that management ''haven't got around to doing it till lately,'' and described the paper as ''just a job clarification . . . just a job description of what you are doing.'' After reading the paper, Jones said that he could not sign it, because he did not in fact select laborers for his crew (item 1), terminate employees (item 12), or prepare evaluations (item 19). Wampler told him that these had always been the responsibilities of a service wire foreman.

On the following day, immediately after Jones had received his regular paycheck, one of the Company's supervisors (perhaps Berry) told Jones that Vice President Stewart wanted to see him in the back office. When Jones entered the office, he found Stewart, Wampler, and Field Superintendent Robert Ainsworth, an admitted supervisor who was Jones' immediate superior. Stewart, who was at the desk, told Jones to sit down. Then, Stewart asked Jones what he knew about the Union, how he had got mixed up with it, what organizers he had met, and how he had first met them; the record fails to show Jones' reply, if any. Stewart asked what ''you all'' were going to do. Jones said that he did not know yet; ''We haven't had another meeting.'' Stewart asked who had started the union organizing; Jones truthfully replied that he did not know. Stewart asked how many people had attended the first union meeting; Jones said, about 50. Stewart asked how many people had signed cards there; Jones said that he did not know whether everyone present had signed cards or not. Stewart asked when the next meeting was to be held, and what the other organizing committee members had done; the record fails to show Jones' reply, if any. Stewart said that Jones was a supervisor. Jones said that he did not think he was a supervisor. He said that the Union had said that it did not want any person who was a supervisor to attend meetings or to sign a card and he was not a supervisor if he could not hire or fire. Stewart said that Jones did indeed have the right to hire and fire. Jones said that this was the first occasion anyone had told him this. Wampler said, ''Well, we have a conflict of interest, then.'' Jones said that he did not know about any conflict of interest. Wampler said, ''Well, you signed some papers and you are with the union, and that [gives] us a conflict of interest.'' Jones said that he still did not know, because he was not a supervisor who could hire and fire. Stewart said, ''Well, you are with the Union; therefore, you are terminated.'' Jones said, ''Okay,'' and got his final pay check.[13]

Wampler testified that Jones was fired because of his support for the Union. Company counsel stated at the outset of the hearing before me that the Company discharged Jones for his role in the union organizing; and that as to him, the only issue is supervisory status.

3. The allegedly unlawful interrogation and discharge of Wycliff McPherson

On November 2, 1989, Wampler came to the jobsite where Wycliff McPherson was working, and said that Wampler had a job description he would like McPherson to read for a 75-cent pay raise. McPherson asked whether this was a simple job description. Wampler said yes, gave him a two-page document captioned ''Cable Foreman,'' and told him to read it carefully and make sure he understood it. This document begins with the statement that a cable foreman ''directly supervises a crew of laborers,'' and then lists 20 separate job functions, some of which specify duties which are at least arguably supervisory. The form ends with a space for a signature over the typewritten words, in capital letters, ''CABLE FOREMAN.'' McPherson reads very slowly. He asked

derstand the description, or any other reason, for his refusal. As to the 7 workers whose names are underscored, the Board and the court declined in *Dickerson-Chapman I* to determine whether they occupied supervisory status; the remaining 11 were found to be employees.

[13] My findings as to Jones' termination interview are based on a composite of credible parts of his and Wampler's testimony.

Wampler what the document was. Wampler said that it was a job description, or job evaluation, for a 75-cent pay raise. McPherson asked if it was just a typical job description. Wampler said that was all it was. McPherson credibly testified that he ''just glanced'' at the document, that he looked at the first page, and that he signed this document without reading it. Later that day, Odess Jones and other workers asked McPherson whether he had signed the paper. He said, ''Yes, for evaluation for a job description—you know, that is all it was, evaluation, 75-cent raise.'' These workers told him, ''No it wasn't for that. It was saying that [McPherson] was a foreman.'' McPherson thereupon went into the office and asked Wampler to ''destroy'' the paper McPherson had signed; Wampler said that he could not do that. However, at McPherson's request, Wampler made him a copy.[14]

On the following day, McPherson was called into Stewart's office. Present in the office were Wampler, Stewart, and Berry. Stewart asked McPherson whether he was responsible for the Union. McPherson said yes. Stewart asked him how he got mixed up with the Union, what nonemployee union organizers he had met, where he first met that nonemployee union organizer, how McPherson got in touch with them, how he found out about the Union, and what he was going to do about the Union. To these questions, McPherson gave what Wampler testimonially characterized as ''evasive'' replies. Stewart asked McPherson when the first meeting had been held; McPherson again gave what Wampler testimonially characterized as an ''evasive'' reply. Stewart asked how many people had attended that meeting; McPherson replied, ''About 50 or 60, approximately all the employees.'' Stewart asked how many union cards had been signed at that meeting and who had signed them; McPherson gave what Wampler testimonially characterized as an ''evasive'' reply. Stewart asked McPherson when the next union meeting was to be held, what organizer would be there, what McPherson was going to do about it, and what the other organizing committee members had done; McPherson gave what Wampler testimonially characterized as ''evasive'' replies. Stewart told McPherson that what he had done had hurt the Company because the Union was not in the Company's best interest. Stewart went on to say that in order to be a foreman, McPherson had to be 100 percent for the Company; that if he was not 100 percent for the Company, Stewart no longer needed him; and that McPherson was fired.[15]

Wampler testified at the hearing before me that McPherson was fired because of his support for the Union. Company counsel stated at the outset of that hearing that the Company discharged McPherson for his role in the union organizing, and that as to his discharge, the only issue is supervisory status.

[14] My findings in this paragraph are based mostly on McPherson's testimony at both hearings. Wampler was not asked about McPherson's request that Wampler ''destroy'' the paper. To the extent that their versions of the earlier conversation differ, for demeanor reasons I credit McPherson.

[15] My findings as to the discharge interview are based on a composite of credible parts of the testimony of McPherson and Wampler. Wampler was not asked to which questions he regarded McPherson as having given ''evasive'' replies; I have attached this characterization to all replies whose exact content is not otherwise shown by the record.

4. The allegedly unlawful interrogation and discharge of James Spiller

James Spiller attended the first union meeting, on October 15, 1989. On an undisclosed date between then and November 2, 1989, Wampler asked Spiller what he thought ''the guys'' were going to do, to which Spiller replied that he did not know; at this time, Spiller had not identified himself to any member of management as a union supporter. The complaint does not allege that Wampler's conduct on this occasion violated the Act.

On November 2, 1989, Wampler called Spiller into the office and asked him to sign ''this sheet.'' The sheet in question was an at least purported job description for the job of cable foreman, and included certain functions at least arguably of a supervisory nature; thus, the ''sheet'' stated that a cable foreman (1) ''directly supervises a crew of laborers on cable-laying jobs''; (2) ''selects laborers for his crew when new laborers are available''; (3) assures adequate crew manning when scheduled laborers fail to report for work; (4) determines ''laborers' skill, diligence, and performance, and recommends reassignment or discharge of deficient laborers''; and (5) ''prepares evaluations of each employee under his supervision.'' Spiller cannot read very well, and was unable to read the document. He said, ''No; I am not going to sign because I wouldn't know what I am signing.'' Spiller credibly testified:

> I asked him afterward, could I take the sheet home and look at it, because, see, I couldn't read good. I would let my daughter and my wife read it to me, and then I could tell him the next morning whether I could sign it or not, because I didn't want to sign the wrong—the sheet that would hurt the company or hurt me.

Wampler did not give Spiller a copy of the job description. Spiller did not read it while he was in the office, and did not sign it.[16]

As previously noted, on February 16, 1990, the Regional Director issued a Decision and Direction of Election in which, inter alia, he found that Spiller was a statutory employee, and included him in the appropriate unit. Spiller attended a union meeting on February 27. On the following day, when he drove a company truck from his jobsite back to the Company's facility at the end of the workday, Berry told him to see Wampler in the office. When Spiller entered the office, he saw Wampler and Ainsworth.

Wampler stated that he was going to ''review'' the duties set forth in Spiller's November 1989 job description (which he had refused to sign), and then described these duties at some length. Then, Wampler stated that Spiller had had ''occasions'' where he had carried out these duties. Wampler

[16] My findings as to this conversation are based on Spiller's testimony before me; he did not testify at the representation case hearing. As to this conversation, Wampler did not testify before me. At the representation case hearing, Wampler testified that he went over with Spiller the job duties specified on the form, that Spiller felt these were his duties, that he had no dispute concerning his duties, and that he asked no questions about what the duties meant. I accept Spiller's version of the conversation, largely because Wampler's version does not suggest any reason for Spiller's refusal to sign the document and Wampler gave the somewhat unlikely testimony that Spiller ''would not'' give any reason for his refusal.

stated, ''I think you remember that time back last June when Johnny Ray Brown . . . had a little problem with him. I think I asked you about it cause I done forgot all the details on it. That was done there on . . . where was he . . . McFadden Road?'' Spiller nodded. Wampler stated, ''I [think] that's about it [and] I think you had a problem with him which resulted in . . . he had to be fired.'' Spiller nodded.[17] Wampler then said, ''Let's see . . . Charles Richardson, that boy that you . . . what was it with him? What was it . . . did you hire him on when Clark went down? Is that the man, Clark Wiley?'' Spiller said, ''Yea, yea, he was working on his farm. He was here when Clark broke his finger.'' Wampler said, ''Yea, that's right, the one you hired. Charles the one you hired when Clark broke his finger, wasn't it?'' Spiller nodded. Wampler said, ''What was it, you let, you told me that Clark . . . when Clark came back, that you wanted to put him back on, wasn't it.'' Spiller nodded. Wampler said, ''That's what I thought too . . . and . . . that Clark . . . you wanted to put him on.''[18]

Then, Wampler remarked that Spiller understood most of his duties and responsibilities so far as needed for him to run the crew. Spiller nodded. Wampler said, ''OK . . . cause most of 'em are pretty much supervisory duties . . . that's what you do every day . . . you've been doing for years and years now.'' Spiller said, ''I got the first book when I came to supervise at the house,'' referring to the book where Spiller entered the time records for his crew.

Wampler said that part of being a supervisor was being part of management; that the Company had decided when the union activity began that the Company was going to fight the Union; and that Spiller's status as a foreman required him to fight the Union alongside of ''us.'' Wampler went on to say that at a laborers' meeting that morning, after the playing of a ''tape'' which asserted that unionization would probably not improve wages or benefits but might cause the employees to wind up out of pocket because they had paid dues, Spiller had remarked that the employees were going to lose it one way or another anyhow. Spiller said that he had been ''losing it for years'' and was going to lose whether or not the Union won. Wampler said that Spiller stood to lose a lot more if the Union won, that Spiller's remarks sounded as if he was encouraging the employees to join the Union, and that this was the last thing in the world he ought to be doing. After stating that Wampler had told him time and again that the Union was no good, Spiller asked ''why are we fighting so hard when we got it now?'' Wampler said that one of the reasons the Company was fighting the Union so hard was ''I hate to see some of these boys pulled into what might happen.'' He went on to say that ''those kinds of comments'' had led ''us'' to believe that Spiller might be ''pretty much in'' with the Union. Spiller gave a noncommittal reply.

Wampler said that the Company wanted Spiller to join its fight against the Union and was giving him an opportunity to ''come clean.'' Wampler went on to say that his first question was whether Spiller had gone to the union meetings. Spiller said, ''I've been down there listening. I ain't going to lie to you.'' Wampler asked why he had been down there. Spiller said, ''Listen to see what.'' Wampler said, ''Listen to see what?'' Spiller said, ''Then I can afford to come in and listen to this thing.'' Wampler asked whether Spiller was going to continue to go to those union meetings. Spiller said that he wanted to listen to both sides. Wampler said that at a recent foremen's meeting he had told the foremen not to go to the meetings, not to have anything to do with union members or organizers, and not to say anything good about the Union as far as trying to help them get in. Then, Wampler asked whether Spiller would be able to stop going to union meetings. Spiller said that if he did not go to union meetings, he would not go to the Company's meetings either; that he was not saying whether or not he would continue going to union meetings; that he would have to keep looking at ''both of them all the way''; and that he was not going to tell the workers not to join the Union or to join it. Wampler said that a regular laborer had a ''choice'' about whether to go to union meetings, but that Wampler was looking at Spiller as a foreman and a supervisor; Wampler asked whether Spiller could change his position. Spiller said that he could not answer Wampler yet. Wampler said that he needed an answer ''now''; that he was asking for Spiller's ''one hundred percent support''; that Spiller was going to have to ''get in the trenches . . . and fight this union just as hard as I am . . . that's what I'm telling [you] you're going to have to do . . . can you do that, yes or no?'' Spiller said, ''No comment . . . that way I can stand a better man.''

Wampler said that Spiller would have to come down on one side of the fence or the other, and could not straddle. Spiller said that he was not going to straddle. Wampler said that Spiller's straddling the fence was the same as telling Wampler Spiller was not going to support Wampler, and ''that's the way we look at it.'' Spiller said that he was going to think it over. Wampler said, ''I can't give you no time to think it over because of thinking over time should have been over the last three months . . . today's the day for an answer. You told me you was going to think over signing this cable foreman's report the day I gave it to you and you never came back to me.'' Spiller said, ''Like I told you, I wasn't gonna sign to hurt me.'' Wampler said that if Spiller was not going to come down on Wampler's side 100 percent he was going to have to let him go, although this hurt Wampler a lot because they had been working together for the Company for more than 12 years. Spiller remarked that he had been working for the Company for 37 years, and asked whether he could change Wampler's mind. Wampler said no, and told him to wait in the office for his final paycheck.[19]

[17] The quotations are from Wampler's tape of his interview with Spiller (see fn. 19 infra). Wampler testified to telling Spiller that ''Brown was fired based on Mr. Spiller's recommendation.'' As to the Johnny Ray Brown incident, see part II,E,2,b,(3),(f), infra.

[18] The quotations are from Wampler's tape of the interview (see fn. 19 infra). Wampler testified that Spiller acknowledged holding Wiley's job open and hiring Richardson temporarily to take Wiley's place. Spiller testified that during this discharge conversation, Wampler did not discuss how Spiller hired Richardson, Spiller did not agree that he would hire Richardson, and there was no talk about Spiller's hiring Richardson or about Spiller's holding Wylie's job open. As to the incidents involving Wiley and Richardson, see part II,E,2,b,(3),(f), infra.

[19] My findings as to the February 28 conference are based on a tape which Wampler took of this conference, and on Wampler's testimonial description of Spiller's conduct during the interview. On the witness stand, Spiller evinced a habit of nodding in contexts where he almost certainly intended to show that he was listening to or un-

Continued

After vainly waiting for a few minutes for his paycheck, Spiller left the facility to pay his regular afternoon visit to his mother, who was in a rest home following a stroke. On the following morning, he returned to the Company's facility. On seeing Berry and Stewart, Spiller said that he had come back to see whether he had a job, that Wampler had said Spiller was terminated. Stewart replied that Wampler was the ''superintendent,'' and that Spiller was indeed terminated. When asked by Spiller for his paycheck, Wampler replied that Spiller's check was in the mail, and that counsel had told Wampler he could do it that way.

Wampler testified at the hearing before me that he discharged Spiller because of his support for the Union, and because Wampler felt that there was no way to get a firm commitment from Spiller that he completely supported the Company's position. Company counsel stated at the outset of the hearing before me that the Company discharged Spiller for his role in the union organizing, and that as to his discharge, the only issue is supervisory status.

C. *Allegedly Unlawful Unilateral Action in July 1990*

Since at least July 1986, the rules and regulations of the Occupational Safety and Health Administration of the United States Department of Labor (OSHA) have required, as to jobsites with open excavations (including trenches), daily inspection by a ''competent person,'' defined as

> one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.[20]

Effective March 5, 1990, the rules were amended to read as follows (54 Fed.Reg. 45961 (1989), 54 Fed.Reg. 43055 (1989), and 29 CFR § 1926.651(k)):

> (k) Inspections. (1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.
>
> (2) Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.[21]

On June 6, 1990, an OSHA inspector visited the Company's Robinson Road site, where a cable crew which included Lee Field Johnson, and a conduit crew which included Lee Earl Moore, were working. When the OSHA inspector walked up, Johnson (found to be an employee in *Dickerson-Chapman I*) was coming out of a hole. The inspector said that the hole was too deep, and said that he wanted to talk to the foreman on the job. Johnson pointed to Moore, whose alleged supervisory status was left unresolved in *Dickerson-Chapman I*. Moore called over Wampler, who was on the jobsite, and Wampler called Stewart.[22]

Under a covering letter dated June 14, 1990, OSHA issued a ''Citation and Notice of Penalty'' which asserted (1) that the Company, in violation of 29 CFR § 1926.21(b)(2), had failed to instruct each of its employees, who were working in a trench, ''on the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury,'' and (2) that the Company had failed to provide high visibility warning vests to employees exposed to public vehicular traffic. OSHA's covering letter stated, in part, that as to uncontested violations, the Company was required to notify OSHA by letter that the Company had taken appropriate corrective action within the time set forth on the citation (July 10, 1990). By letter to OSHA dated June 30, 1990, Wampler noted, in part:

> Effective July 2, we have begun a comprehensive program for all competent personnel which will conclude July 6, 1990. Additionally we have scheduled CPR [cardiopulmonary resuscitation] classes with the Red Cross at their earliest convenience, July 14 & 21, 1990. All employees will be trained in the recognition and avoidance of unsafe conditions as required.
>
> In regards to the exposure to the public vehicular traffic, all employees on said job site were immediately

derstanding what was being said, without necessarily agreeing with it; Wampler, who had worked with Spiller for 12 years, testified that Spiller's ''usual nod . . . expresses he understood or was agreeing with you.'' Moreover, Spiller, a semiliterate black man who appeared to be about 60 years old, evinced reluctance to engage in avoidable on-the-job confrontations with his supervisors, all of whom are white (except perhaps Berry, who did not testify). In assessing Spiller's credibility generally, I have taken into account his testimony, which is refuted by the tape, that during his discharge interview Wampler did not go over Spiller's ''duties as a cable foreman.''

[20] This definition was in effect no later than July 7, 1986; see 29 CFR § 1926.32(f); 44 Fed.Reg. 8577 (1979); 44 Fed.Reg. 20940 (1979); 51 Fed.Reg. 24526, 24528 (1986). It appears unchanged in 29 CFR § 1926.650.

[21] OSHA regulations effective since at least July 1986 and until February 1990 read, in part (29 CFR §§ 1926.650(i), 1926.651(d); 44 Fed.Reg. 8577 (1979); 44 Fed.Reg. 20940 (1979); 51 Fed.Reg. 2426, 2428 (1986):

> Daily inspections of excavations shall be made by a competent person. If evidence of possible cave-ins or slides is apparent, all work in the excavation shall cease until the necessary precautions have been taken to safeguard the employees.
>
> . . . .
>
> Excavations shall be inspected by a competent person after every rainstorm or other hazard-increasing occurrence, and the protection against slides and cave-ins shall be increased if necessary.

[22] My findings in this paragraph are based mostly on Johnson's testimony. For demeanor reasons, I do not credit Wampler's testimony that Johnson was the first individual the inspector approached on the jobsite because he wanted to talk to the foreman on the job. Moore testified that he did not know why the inspector talked to Johnson instead of somebody else.

> provided with warning vests as per your requirements. Dickerson-Chapman, Inc. is currently purchasing such vests for all personnel and will mandate that such vests be worn at all times. Additionally Dickerson-Chapman will mandate that all personnel be properly suited in all necessary safety garments required by the Occupational Health and Safety Administration . . . .
>
> We are currently adapting our management structure to avoid such future [occurrences] . . . .

As previously noted, on May 9, 1990, the Acting Regional Director certified the Union as the employees' statutory representative. The October 1990 complaint alleged that the Union was certified on that date; the answer admitted this allegation, but denied that the certification had any legal force or validity. *Dickerson-Chapman I* found that the company violated Section 8(a)(5) and (1) of the Act about May 14, 1990, by rejecting the Union's May 14 request for recognition. 301 NLRB at 268. As previously noted, during the proceedings which led to this certification, the Board had included in the unit by name, among others, J. D. Freeman, James Hicks, Earl Howard, Lee Field Johnson, Harvey Miner, Tommy Obie, Elijah Pitchford, Joe L. Smith, Robert Taylor, and Vernon Wilson Jr. In addition, the Board had specifically included in the unit Kenneth Easterling, and Wampler testified that after Easterling's death, James Wade took over Easterling's job about March 1990.

Between July 2 and 6, 1990, while the Company's request for review of the certification was pending before the Board, Wampler conducted a series of meetings, referred to in the record as safety meetings, among workers who included those (except Easterling) named in the preceding paragraph, the other workers named supra at footnote 2, and Ronald Johnson, George Jones, Tommie Lee Jones, Charles Luckett, and Otha Lee Wilson. As to each group, Wampler conducted a 3-hour training session in the foremen's room. Among the instructional materials used by Wampler were certain written training materials, and transparencies which consisted of largely verbatim copies of certain OSHA rules and regulations. During the meetings, Wampler gave many, and perhaps all, of those present a 63-page manual captioned ''Dickerson-Chapman, Inc./Level One/Foreman, and Crew Leader's/Policy, Procedure, and Safety Manual,'' with the instructions to keep it in their trucks. Most of this manual consists of substantially verbatim copies of various OSHA regulations. However, in the middle of the manual are a page, and an attached form, directed to the Company's ''excavation permit policy.'' Under the heading ''Rules,'' the first page forbids foremen and crew leaders to direct or permit their crew to undertake any excavation (1) more than 4-feet deep without the written permission of the ''Excavation Safety Officer'' or (2) more than 20 feet unless the plan for that excavation has been designed by a registered professional engineer. Under the heading ''Exceptions,'' this page provides, in part, that in case of emergency excavations during specified nonbusiness hours, for which the ''Excavation Safety Officer'' is to assume direct responsibility, the foreman or crew leader ''as soon as time permits'' is to report ''on the attached form'' safety measures taken at the emergency site. To this page is attached a form which is to be filled out by the foreman or crew leader. The form calls for entries in blanks following the words, among others, ''Proposed Maximum Depth,'' ''Anticipated Atmosphere Hazardous?'', ''Anticipated Water Hazard?,'' ''Anticipated trench length,'' and ''Other hazards and avoidance plans.'' For reasons discussed, infra, I infer that some of the foremen and crew leaders were insufficiently literate to fill out these forms. Wampler testified in February 1991, 6 months after these meetings, that although he explained during these meetings the role of the foreman or crew leader in connection with the excavation permit process, the Company had not yet been able to implement this policy but did anticipate beginning to implement it ''when time permits.'' He further testified that OSHA ''would very much like for you to have'' an excavation safety officer, but that the Company had not been able to hire one.

These safety meetings lasted until about the normal end of the shift for the workers who attended. Toward the end of each meeting, Wampler gave a written job description to each of those present, and asked each worker to sign the job description given to him and then return the document to Wampler. All of the workers did so. No worker received a copy to keep. One of the workers at the second meeting asked for a copy. Wampler said he would ''get them one''; the record fails to show whether anyone else at any of the meetings asked for a copy, or whether such a copy was ever provided. Wampler testified that he handed out these job descriptions 30 to 40 minutes before quitting time. For demeanor reasons, I credit the testimony of Lee Field Johnson that by the time the job descriptions were handed out at the July 3 meeting, ''it was quitting time.'' Also for demeanor reasons, I credit similar testimony as to the July 5 meeting by Tommie Lee Jones, Joe L. Smith, and Vernon Wilson Jr. I note that most of the workers at the July 5 meeting received a job description for ''crew leader,'' a job for which the Company had never previously distributed a job description.

Wampler testified that the ''OSHA requirements'' in these 1990 job descriptions were drawn up by company counsel, who, as previously noted, had also drawn up the job descriptions signed in November 1989; but that as to the remaining portions of the 1990 job descriptions, it was Wampler alone who redrafted them, they were ''for the most part identical to'' the 1989 job descriptions, and the 1990 descriptions ''covered no difference in area'' (cf. infra, part II,E,5,a). He further testified that the Federal law requirements about safety were the only reason why the Company changed the job descriptions of foremen and crew leaders in July 1990.

The first meeting, on July 2, was attended by one worker (Earl Howard), to whom Wampler gave the job description of ''crew leader,'' and by two workers (George Jones and Ronald Johnson) to whom Wampler gave the job description of ''bore foreman''; no such job descriptions had been given out in November 1989, a period when the Company does not claim to have had any bore foremen. This July 2 meeting was also attended by two workers (James Hicks and James Wade) to whom Wampler gave the job description of ''pole foreman''; and five workers (J. D. Freeman, Charles Luckett, Harvey Miner, Homer Parker, and Robert Taylor), to whom Wampler gave the job description of ''service wire

foreman.''[23] The complaint alleges that the Company violated the Act by its July 1990 personnel action with respect to all these workers except Parker, whom *Dickerson-Chapman I* found to be a supervisor. The second meeting, on July 3, was attended by one worker to whom Wampler gave the job description of ''conduit foreman'' (Lee Earl Moore); and eight workers to whom Wampler gave the job description of ''cable foreman'' (William Burkes, Clifton Hayman, Linden Hill, Lee Field Johnson, Isaiah McDonald, Tommy Obie, Jewel Owens, and Clifford Stafford). The complaint alleges that the Company violated the Act by its July 1990 personnel action with respect to all these workers except Hayman, whom *Dickerson-Chapman I* found to be a supervisor. The third meeting, on July 5, was attended by one worker to whom Wampler gave the job description of ''conduit foreman'' (Vernon Wilson Jr.), and three workers to whom Wampler gave the job description of ''crew leader'' (Tommie Lee Jones, Elijah Pitchford, and Joe L. Smith). The complaint alleges that the Company violated the Act by its July 1990 personnel action with respect to all of these workers. The last meeting, on July 6, was attended by two workers to whom Wampler gave the job description of conduit foreman (Alva Abel and Otha Lee Wilson). The complaint alleges that the Company violated the Act by its personnel action with respect to Otha Lee Wilson but not as to Alva Abel, whom *Dickerson-Chapman I* found to be a supervisor.

The job descriptions of service wire foreman, pole foreman, conduit foreman, and cable foreman issued in November 1989 were received in evidence in the representation case hearing; as previously noted, the Board and the court of appeals found to be statutory employees 11 workers who had received 1 of these 4 job descriptions. Unlike the job descriptions issued in November 1989, each of the job descriptions issued in July 1990 contains a section captioned ''Safety Responsibilities'' which in some respects is substantially the same in all of the job descriptions. The content of the July 1990 job descriptions, and to some extent of the November 1989 job descriptions, is discussed, infra.

As to what the workers present understood in consequence of what occurred at the July 2–6, 1990 meetings, what was actually said during these meetings is significant in view of the severe limitations on the ability of some of the workers to read, the predictable inability of other workers to understand significant parts of the rather sophisticated and/or technical vocabulary used in the written materials shown or given out to the workers, and the Company's failure to provide the workers with copies of the job descriptions they were told to sign. Thus, a number of the workers who attended these meetings had initially been hired as laborers, of whom the Company does not require any degree of literacy as a condition of hire. Moreover, as to workers promoted from the ranks to be ''foremen'' or ''crew leaders,'' Wampler merely testified that the Company ''generally like[s]'' them to have ''some degree of literacy that [they are] able to read and write, fill out applications, [read blue] prints, things of that nature. . . . Obviously, if it [is] somebody that we are bringing up through the ranks, it takes a great deal more time to bring to that stage.'' The record evidence (including credible testimony from some of the workers themselves) affirmatively shows that several of the workers in attendance possessed at most an exceedingly low level of literacy.[24]

Further, the record affirmatively shows that the workers who attended the safety meetings did not understand significant parts of the material presented there. Thus, although the Company contends that it conducted these meetings mostly for the purpose of advising those present that the Company was naming them as and giving them the duties of ''competent persons'' within the meaning of the OSHA regulations, and even though the regulations' definition of ''competent person'' was the first item in the transparencies and in the accompanying written material, Supervisor Hayman credibly testified that he did not know the meaning of the term ''competent person,'' and George Jones defined it as ''a person that was able to make decisions.'' In addition, the testimony of some of the workers who testified that they read these job descriptions before signing them shows that these workers did not understand at least certain part of the descriptions they signed. Thus, although all the job descriptions require the subject worker ''to assure that *all surface encumbrances adjacent to a trench or other excavation* are located so that they will not create a hazard to employees'' (emphasis added), Freeman, Hayman, Lee Field Johnson, George Jones, Tommie Lee Jones, Joe L. Smith, Otha Lee Wilson, and Vernon Wilson Jr. all credibly testified that they did not understand the meaning of the underscored words. Also, although all the July 1990 job descriptions state that the subject ''is expected to fulfill the role of 'competent person' on each of his job sites,'' the previously noted testimony of Hayman and George Jones shows that they did not understand this portion of the job descriptions. In addition, although the job description signed by Hayman required him to ''follow the Company's excavation permit policy,'' when asked what the ''excavation permit policy'' is he replied, ''I don't believe I know what you are talking about.''[25] Further, several workers who attended the safety meetings credibly testified that they did not (and in some cases could not) read the job descriptions before signing them and returning them to the Company; I infer that at least as to those who could read, their failure to read these documents may have been at least partly due to the Company's postponement of their distribution to a time shortly before the workers' usual quitting hour.

Wampler testified that at all four of these safety meetings, management talked to the workers at great length on the responsibilities they had and the procedures they had to follow. He went on to testify that management covered all of the

[23] As to all four meetings, my findings as to which meeting was attended by which workers are based on the dates which they attached to their signatures on the job descriptions.

[24] Such testimony is not belied by Wampler's testimony that none of these workers had ever told him they could not read. This is a deficiency which people frequently try to conceal from others, including their employers.

[25] Moreover, at the representation case hearing, Vernon Wilson Jr. replied ''I don't quite understand what you are talking about'' when asked whether he had ever engaged in ''Determining a laborer's skill, diligence, performance, and recommending the reassignment or discharge of deficient laborers.'' This language is included in the November 1989 job description which he refused to sign. The July 1990 job description, which he did sign, states that the subject ''is expected to judge his laborers' skill, diligence, and job performance and to recommend reassignment or discharge of unsatisfactory crew members.''

material embodied in the transparencies; such material included the definition and duties of a ''competent person,'' which definition, as previously noted, was not understood by, at least, George Jones and Hayman, who attended the first and second meetings, respectively. J. D. Freeman, who attended the first meeting, credibly testified that during this meeting, management told those present that they were able to hire and fire. Lee Field Johnson, who attended the second meeting, credibly testified that during this meeting, Wampler brought up and explained the regulation about the excavation and trenching, said that the workers at that meeting had the responsibility to stop other members of their crew from engaging in unsafe practices, and told the workers at the meeting that they were supervisors, had authority to hire and fire employees, and were responsible for the men.

During each of these meetings, Wampler told those present that the Company was going to adjust their job descriptions to take their ''competent person'' duties into account, and that it would not be right to require the workers to take on these new responsibilities without compensating them for what they were being asked to do. All the workers who attended these meetings received 4- to 6-percent pay raises; to the extent that the record reveals the amount of such increases, the record shows that they varied between 25 cents and $2 an hour, with an average of about 65 cents. The testimony indicates that these increases were reflected in the paychecks received on Friday, July 6. Wampler testified that union activity had nothing to do with these raises, that the major reason therefor was the workers' increased duties under OSHA, but that some increases were also merit increases.

All of the workers who attended these safety meetings were thereafter sent to a course in cardiopulmonary resuscitation conducted by the American Red Cross. Wampler testified in February 1991 that such a course had been taken by all but one of the incumbents whom the Company had classified as foremen or crew leaders; the one exception had been so classified for 2 weeks, and Wampler testified that the Red Cross does not like to give such a course for only one student.

All of the job descriptions issued at these safety meetings stated, under the heading ''Safety Responsibilities,'' that the individual ''must assure that employees who will be exposed to public vehicular traffic are provided with, and that they wear, warning vests.'' As of early January 1991, some of the workers who attended these safety meetings had received warning vests and ''cones'' (inferentially, small, and movable pylons) for their respective crews, and some had not. Wampler testified that the Company had tried to supply the foremen and crew leaders with warning vests, and that it was the foreman's responsibility to see to it that the crewmembers wear warning vests. Wampler further testified that OSHA required that pylons be put on the road, that the Company had tried to supply the foremen with the number of pylons needed, and that having them put out is the foreman's responsibility. In addition, Wampler testified in February 1991 (more than 7 months after the OSHA inspection) that OSHA required the use of hard hats; that after some difficulty, the Company had received them; that after receiving them, the Company had experienced difficulty in putting on them ''logos and things like that''; that the Company would start distributing them as soon as possible; and that seeing to it that the employees wear them ''is the foreman's responsibility.'' The July 1990 job descriptions except that of pole foreman state that where hazardous atmosphere conditions are present in an excavation, the person in the described job is to ''assure continued testing, proper ventilation and other counter measures, and the nearby availability of emergency rescue equipment.'' All of these job descriptions except those of pole foreman and crew leader provide that when a person in the described job

> may reasonably expect oxygen deficiency in excavations greater than four feet, . . . he shall assure testing of the atmosphere conditions in the excavations before allowing employees to enter . . . . If testing reveals an atmospheric oxygen content of less than 19.5%, [he] shall not allow employees to enter without respirators. [He] shall not allow employees to enter an excavation in which the atmosphere contains a concentration of a flammable gas in excess of 20% of the lower flammable limit of the gas.

Wampler testified that it is the foreman's responsibility for seeing to it that the equipment operator gives the appropriate warning using his equipment. The Company has never provided any equipment for monitoring the percentage of oxygen or flammable gas in excavations, or any respirators.[26]

Wampler testified that without consulting anyone else, he decided to give the OSHA ''competent-person'' responsibilities to the ''foremen'' and ''crew leaders,'' rather to somebody else, because ''there was no other possible person who would qualify for that. Nobody else had that kind of authority other than the foremen or the crew leaders.'' All of the Company's action in early July 1990 with respect to the ''foremen'' and ''crew leaders,'' including the wage increases they received, was taken without giving the Union prior notice and an opportunity to bargain.

D. *Alleged Unlawful Unilateral Action in Early August 1990*

As previously noted, on July 17, 1990, the Board denied review of the Regional Director's action in certifying the Union on May 9, 1990. On an undisclosed date in July 1990, South Central Bell advised the Company that the work which South Central Bell gave the Company would be drastically curtailed, effective immediately and for an indefinite period of time. A hand-delivered letter to the Union dated July 31, 1990, from Company Attorney R. Pepper Crutcher Jr., stated that the Company would not bargain with the Union as the ''exclusive collective bargaining representative for certain of [the Company's] employees'' because the Union had allegedly been erroneously certified and (therefore) the Company had no legal obligation to bargain with it (see part II,A supra). That letter further said:

[26] Supervisor Hayman testified that although he did not keep a gas tester ''on [his] crew at all times,'' he could get one from the Company any time he needed one, and that by using a gas tester, he would be able to ascertain whether an excavation had a concentration in excess of 20 percent of the lower flammable limit of a gas. As previously noted, his testimony shows that he failed to completely understand what he was told at the safety meeting.

> Our client is willing, however, to meet and confer with you . . . in good faith, to record in writing any agreement reached, and to abide by any such agreement recorded concerning the subject I discuss below, with the understanding that the company does not recognize your union as its employees' collective bargaining representative and that it reserves all rights to contest your union's certification.

Crutcher's letter went on to say that a drastic decline in work orders would make work unavailable (1) immediately for 50 to 75 percent of the Company's cable crews; and (2) within the next 10 to 20 days, for the Company's conduit crews, ''unless sufficient work orders are received for the North State Street project. Boring, service wire, and pole crews should also feel the impact of this work reduction.'' The letter further stated that the Company

> plans to follow its past practice in similar situations, in three phases. For the present, it will dispatch crews to available work, while paying those crews not dispatched for the hour during which they report for work and are told that no work is available. The Company plans to dispatch crews according to the pay rate of crew foremen. . . . If the reduced workload persists until October 1, 1990, the company plans to implement phase two. The Company first will determine how many crews are needed within each division . . . on a regular basis. It then will offer operator, driver, or laborer positions to affected foremen and crew leaders using pay rate and seniority as ranking criteria. For a period of six months, the affected foreman and crew leaders would retain their pay rates while working in the lower rated job. The remaining workforce would be reduced by seniority . . . .
>
> If the situation persists beyond April 1, 1991, affected foremen and crew leaders would be reduced to rates paid to others in their positions.

The lists attached to this letter stated that Vernon Wilson Jr. was the last ''conduit foreman'' on the basis of ''pay rate, then seniority.'' Wilson worked a full day on Tuesday, July 31, 1990, the date on which company counsel's July 31 letter was hand delivered to the Union. Wilson reported to the Company's facility at 7 a.m. on Wednesday, August 1, 1990. Field Superintendent Ainsworth told him that there was nothing for him to do, and told him to ''write [his] hour down and go on back home.'' Until September 10, 1990, when he obtained a job elsewhere, Wilson continued to report to the Company's facility at 7 a.m. every weekday, and continued to be told that there was nothing for him to do and to go home with 1 hour's pay. The Company had never before cutback Wilson's hours for a reason unrelated to weather. When he had showed up for work but had been sent home because of the weather, he had been paid 1 hour's showup pay. The two other members of his crew—James Blackwell and Clark Thompson—were also paid 1 hour's showup pay a day until August 10, 1990. Wampler testified that Blackwell was ''surplussed'' because he was assigned to a crew which had no work and none of the other crews had expressed any interest in him. Wampler further testified that ''the other crews'' had ''hired back as many as they wanted from the surplussed employees. Some of the other crews . . . did pick up what they needed.''

A hand-delivered letter from company counsel to the Union dated August 3, 1990, indicates on its face that the parties had agreed to meet on Monday, August 6. This letter ''amend[ed] and supplement[ed]'' the July 31 letter by stating that

> With the conditions and limitations expressed in that letter, [the Company] offers to meet and confer in good faith, to reduce any agreement reached to writing, and to abide by any such agreement, concerning the effects, if any, on its laborers, laborer/drivers, drivers, operators, and maintenance shop employees of the duties assigned to foremen and crew leaders in job descriptions issued in the first week of July, 1990.

The conference between the Company and the Union was scheduled for 10 a.m. on Monday, August 6. At 7 a.m. that day, Lee Field Johnson reported to the Company's facility. Johnson had been named in company counsel's July 31 letter as the last ''cable foreman'' on the basis of ''pay rate, then seniority.'' The Company did not assign him to work on August 6, and gave him 1 hour's ''show-up'' pay. He continued to report to work from Monday through Friday at 7 a.m., and to be sent home with 1 hour's ''show-up'' pay, until Monday, October 2, when he was assigned to work as a laborer (at his previous pay rate, but admittedly as an employee) on a crew led by Elijah Pitchford. The laborers on Johnson's crew just before he was put on his 1-hour ''show-up pay'' basis were Calvin Carr, Robert Bell, and Charlie Lee Williams. Carr and Bell were transferred to Joe L. Smith's crew and Howard's crew, respectively, and continued to work on a relatively full-time basis until at least the week ending October 13, 1990.[27] Charlie Lee Williams was transferred to Joe L. Smith's crew, worked 44 hours during the week ending August 11, and was laid off on August 14. Johnson resumed working as a cable foreman during the second or third week in January 1991, with two members of his former crew, Bell and Carr.

During the August 6 conference, the Company's spokesperson was Attorney Crutcher and the Union's spokesperson was Business Representative Glen Crawford. Crutcher asked whether the Union had any proposals to make concerning the subjects of Crutcher's July 31 letter concerning layoffs and his August 1 letter concerning the effect on admitted employees of the job descriptions issued in early July 1990. Crawford asked Crutcher if the Company was willing to recognize the Union as the employees' collective-bargaining representative and begin negotiating a collective-bargaining agreement. Crutcher said that the only thing the Company was willing to discuss was whom it was going to lay off, that the Company did not recognize the Union as the bargaining representative, and that the Company reserved the right to contest the Union's certification. The Union declined to talk about the Company's proposals under the terms con-

[27] During this 10-week period, Carr received at least 40 hours' pay during each week except the weeks ending August 11 (26 hrs.), August 18 (36 hrs.), September 8 (31.5 hrs.), and September 22 (34 hrs.). During this same 10-week period, Bell received at least 40 hours' pay during each week except the week ending August 18 (32 hrs.); Bell was on vacation during the week ending August 11.

tained in Crutcher's July 31 and August 1 letters, as to layoffs said that it wanted to talk about the ''whole issue,'' and stated that these matters should be discussed only as part of contract negotiations. The meeting lasted a total of about 10 minutes. Union business representative L. W. Smith, who attended this conference, credibly testified that the Union wanted to talk about more than just the layoff and the Company's proposed system for a layoff because:

> when you are talking about a reduction [in] work force, there is several different issues involved such as seniority right, whether an employee would have the right and how long he would have that right for recall, and if he would have a seniority right to bump lower seniority employees; vacation, whether that employee would be entitled to receive what vacation pay he had coming; wage increases, when that employee returned to work whether he would be entitled to any wage increases; insurance, whether if an employee was laid off if the company would retain insurance on that employee for a certain length of time or if the employee could self pay; sick leave, whether his sick leave days would be frozen or whether the company would pay the employee what sick leave days he might have.

The Union made no proposal in that meeting about how to deal with seniority, how to accommodate bumping rights, recalls, vacation, insurance, sick leave, or how the Company should deal with the at least alleged lack of work.[28] Smith testified that the Union did not really have a chance to make a specific proposal because Crutcher indicated that the only issue the Company was willing to discuss was who was to be laid off.

Company counsel's July 31 letter to the Union had listed Otha Lee Wilson as the next-to-last ''conduit foreman'' on the basis of ''pay rate, then seniority.'' On Thursday, August 8, Wampler told him and his crew (Michael Smith, Darren Carter, and Ernest Barber) that they were being laid off for lack of work. On the following day, when all four men came in to pick up their checks, Wampler told them that if they came in every day, they would be able to turn in a 1-hour ''short time,'' and if someone was needed to go out, they could be picked to go out. Smith and Carter stopped reporting to the facility after August 13 and August 10, 1990, respectively; General Counsel's Exhibit 40 states that they voluntarily quit on August 27 and 24, 1990, respectively. General Counsel's Exhibit 40 states that Barber voluntarily quit on August 24, 1990, and was ''reactivated'' to crew 5200 (Wade's crew) on August 30. Thereafter, and until the week ending October 6, Barber worked almost a full week every week.[29] Between the week ending August 18 and the week ending September 29, 1990, Wilson was entirely or almost entirely paid ''show-up pay'' only (see supra at fn. 29). Thereafter, Wilson worked on George Jones' crew for 3 or 4 weeks, and then began to lead a service wire crew, which job he was still performing when he testified before me in January 1991. Throughout this period, his pay rate remained the same.

Otha Lee Wilson was the last alleged supervisor to be put on a 1-hour-per-day ''show-up'' basis. Various admitted employees are listed by General Counsel's Exhibit 40 as having been ''surplussed'' on various dates between August 9 and 23, inclusive. Three of them had been on the crew of admitted Supervisor Abel, whose crew before the layoff had consisted of six employees not including him; and two of them had been on the crew of ''cable foreman'' Obie, whose crew before the layoff had consisted of three employees not including him. The remaining ''surplussed'' employees each came from a different crew. Admitted Supervisor Hayman, one of whose crewmembers (Willie Williams) was ''surplussed'' on August 13, testified that it was Hayman who decided which laborer would leave Hayman's crew, and that it was Wampler or Stewart who assigned laborers to another crew; Willie Williams was reassigned from Hayman's crew to George Jones' crew on August 20 (according to G.C. Exh. 40) or during the week ending September 15 (according to the Company's payroll records) and worked continuous 40-hour weeks from the week ending July 28 through the week ending September 29, after which his name unexplainedly disappeared from the Company's payroll. Alleged Supervisor Lee Earl Moore testified for the Company, on direct examination, that it was he who decided which laborers on his crew would be laid off. On cross-examination, he testified that the two who left his crew were ''Armstrong and Montgomery''; that they were thereupon put on another crew, and that it was Wampler or Stewart who decided what other crew they were to go to. The Company's payroll records include Roy Montgomery and Armstrong Montgomery, who are brothers; state that Roy Montgomery remained on Moore's crew, and worked 40 hours a week, from the week ending July 28 through the week ending October 13; and further state that during this same period Armstrong Montgomery worked at least 40 hours a week on Jewel Owens' crew. The Company's brief cites only Hayman's and Lee Earl Moore's testimony in support of its assertion that the foremen played a role in choosing who would be laid off (Br. 56–58).

Wampler testified before me that since about June 1978 the Company had had one layoff, in 1982 or 1983. At that time, according to Wampler, '' the foremen reduced each crew by one,'' no foremen or crew leaders were laid off ''because we knew it was a short-term thing as opposed to an indefinite,'' and the laid-off employees were ''rehired . . . a short time period later.'' Odess Jones testified at the November 1989 representation case hearing that the Company had had a layoff a year or two ago, when he was leading a service wire crew, and that ''they'' laid off a ''pretty good man working with me. . . . They didn't give me no choice about whether I wanted to keep the man or not.''

By letter to Crutcher dated September 11, 1990, Union Attorney John L. Quinn stated that on the Union's behalf, ''I am writing to reaffirm our continuing request to bargain with [the Company] concerning wages, hours, terms and conditions of employment. Please advise whether [the Company] will agree to meet and bargain or whether it will be necessary to continue to seek recourse through the NLRB.''

[28] The Company's unit employees had no insurance, and apparently had no sick leave.

[29] The Company's records state that during the week ending September 8, Barber worked on crew 5800, which was Otha Lee Wilson's crew. During that week, which included Labor Day, Wilson was credited with 12 hours of work; inferentially, this consisted of 8 hours' pay for Labor Day and 1 hour's showup pay for each of the remaining 4 days.

Crutcher's reply letter dated September 14, 1990, stated, in part:

> If you ask whether [the Company] will meet at reasonable times and places with [the Union's] designated representatives, confer with them in good faith, reduce to writing any agreement reached, and abide by any agreement reached, with respect to the outstanding disputes, while reserving the company's right to challenge the union's certification, then, . . . the answer has always been and continues to be yes.
>
> The only obstacle to discussion of the outstanding disputes (and I think their amicable resolution) is your client's insistence that my client waive its right to contest the union's certification . . . as a prerequisite to discussions. If [the Union] no longer insists on that condition as a prerequisite to discussions, please let me know when and where you would like to meet.

By letter to Crutcher dated September 26, 1990, Quinn stated, in part:

> We were somewhat surprised by [the Company's] recent expression of willingness to meet and bargain with the union. As always we stand ready.

After suggesting three specific dates for meetings, Quinn's letter went on to say:

> Our willingness to meet and bargain does not constitute recognition of, or acquiescence in, your challenge to the union's status as the certified bargaining representative of [the Company's] employees. We believe that [the Company] has attempted to impose unlawful conditions on the bargaining process and we have every intention of pursuing our remedies before the NLRB and before any other appropriate legal tribunal.

By letter to Crawford (which enclosed copies of the Crutcher-Quinn correspondence) dated November 12, 1990, Crutcher stated, in part:

> When we last met . . . on August 6, the union was not willing to work toward resolution of [outstanding disputes] except as part of contract negotiations, and you indicated that you wanted [the Company] to drop its contest before discussing our outstanding disputes. If you want to meet and discuss the outstanding issues, and will agree that we do so without waiving [the Company's] contest of your union's certification, then please give me dates when you are available.

The parties eventually met in a settlement conference on December 18, 1990, but no settlement was reached.

E. *Analysis and Conclusions*

1. The allegedly unlawful pay raises in November 1989

a. *Whether these pay raise allegations are barred by Section 10(b) of the Act*

As issued on February 26, 1990, the first complaint herein alleged that the Company violated Section 8(a)(3) and (1) by giving pay raises about November 2, 1989, to 21 named individuals, each of whom, the Company contends, was a statutory supervisor. The Company has never contended that this allegation is beyond the scope of the relevant underlying charge, which was filed on February 26, 1990, and which alleges that as to these 21 individuals, the Company ''On or about November 2, 1989, granted wage increases . . . in order to discourage membership in or affiliation with the Union.'' However, on July 24, 1990, the second day of the 11-day hearing before me and about 6 months before the Company rested its case, the General Counsel moved for leave to amend the complaint so as to allege that on or about November 2, 1989, the Company violated Section 8(a)(3) and (1) by giving pay raises to all employees.[30] Over the Company's objection, I granted the motion.

The Company opposed the motion to amend, and in its posthearing brief claims that I erred in granting the motion, on the ground that as to the employees added by such allegations they exceed the scope of the February 1990 charge, were made more than 6 months after the grant of the allegedly unlawful wage increases, and, therefore, were barred by Section 10(b) of the Act. The amendment alleged that with respect to employees not named in the charge, the Company had engaged in the same conduct, on the same or about the same date, by reason of the same union campaign, as the Company had allegedly engaged in with respect to the individuals named in the charge. Accordingly, I adhere to the ruling which I made at the hearing. See *Telegrapher Workers (A. H. Bull Steamship Co.) v. NLRB*, 347 U.S. 17, 34 fn. 30 (1954); *NLRB v. Central Power & Light Co*., 425 F.2d 1318, 1320–1321 (5th Cir. 1970); *Columbia Textile Services*, 293 NLRB 1034, 1034–1037 (1989), enfd. 917 F.2d 62 (D.C. Cir. 1990); *Recycle America*, 308 NLRB 50 (1992); *Drug Plastics & Glass Co*., 309 NLRB 1306 fn. 2 (1992).

b. *Whether the pay raises were unlawfully motivated*

As the Company does not appear to question, the November 1989 pay raises violated Section 8(a)(1) and (3) if, as the General Counsel contends, they were motivated by a desire to discourage union activity. *NLRB v. Exchange Parts Co*., 370 U.S. 405, 409–410 (1964); *Kokomo Tube Co*., 280 NLRB 357 (1986); *A/Z Electric*, 282 NLRB 356, 363–365 (1986). I agree with the General Counsel that the November 1989 pay raises were so motivated.

Thus, the evidence shows that the Company knew about the union activity, retained attorneys to fight the Union, and gave most of its employees pay raises reflected in the paychecks they received on November 3, 1989, 3 days after the Union filed its representation petition. Further, that same day, the Company by its own admission discharged Odess Jones and McPherson for union activity; and on February 28, 1990, the Company by its own admission discharged Spiller for the same reason and because he failed to promise to campaign against the Union in the future.[31] During the discharge inter-

[30] I accept the General Counsel's statement that until receiving certain material from the Company in response to a subpoena, she had been unaware that pay raises were granted to employees other than the individuals named in the complaint.

[31] Although the Company contends that these discharges were not unlawful on the ground that the dischargees were allegedly super-

view with Spiller, Wampler stated that the Company had decided when the union activity began that the Company was going to fight the Union. Moreover, at the last employee meeting of company personnel before the union activity began, when Isaiah McDonald asked Company Vice President Stewart if he could tell them when they were going to get a raise, Stewart replied that they had not earned a raise, that they were not working hard enough, that they should be glad to have a job, and that he would give them a raise when he got ready. Furthermore, in the past raises had been given in June or July rather than November; had been much lower than those given in November 1989;[32] and (unlike the November 1989 raises) had excluded all employees with less than 1 year's service. Wampler's testimonial explanation for why no raises were given until November 1989—namely, unanticipated insurance premium increases which were paid between July and October—was not given to the workers when the subject of raises was brought to Vice President Stewart's attention in the fall of 1989 but before the union activity began in mid-October. Accordingly, I do not credit Wampler's testimony that the timing of the November 1989 raises had nothing to do with the Union's appearance. Rather, I conclude that these raises were given in November 1989 for the purpose of discouraging support for the Union.

2. Whether certain individuals were statutory supervisors before July 1990

a. *Introduction and controlling legal principles; the effect of Dickerson-Chapman I*

Section 2(11) of the Act defines a supervisor as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Anyone who in the employer's interest has the authority to use independent judgment in the execution or recommendation of any of the functions listed is a supervisor. *Dickerson-Chapman I*, supra, 964 F.2d at 497; *Monotech of Mississippi v. NLRB*, 876 F.2d 514, 517 (5th Cir. 1989); *Ohio River Co.*, 303 NLRB 697 (1991); *Bricklayers Local 6 (Key Waterproofing)*, 268 NLRB 879, 883 (1984). However, the burden of proving that an individual is a supervisor rests with the party alleging that supervisory status exists. *The Door*, 297 NLRB 601 fn. 5 (1990); *Rahco, Inc.*, 265 NLRB 235, 247 (1982); *Aquatech, Inc.*, 297 NLRB 711, 717 (1990), enfd. 926 F.2d 538 (6th Cir. 1991); *Pacific Dry Dock Co.*, 303 NLRB 569 (1991).

As previously noted, *Dickerson-Chapman I* found, on the basis of the representation case record, that the 14 individuals named in the margin occupied employee rather than supervisory status on March 30, 1990, the date of the representation election.[33] The complaints allege that the Company violated Section 8(a)(3) and (1) of the Act by certain conduct directed toward these individuals in November 1989 and toward some of them in July 1990. No contention having been raised that any of these 14 individuals acquired supervisory status between March and July 1990, *Dickerson-Chapman I*'s finding as to such individuals, although it does not constitute res adjudicata with respect to these specified complaint allegations, is entitled to persuasive relevance.[34]

Moreover, *Dickerson-Chapman I* also bears on the status of the six individuals as to whom it declined to rule, and of certain individuals who were allegedly hired as supervisors, or who allegedly acquired supervisory status, after the representation election. Thus, the company has contended since at least its initial brief in the representation proceeding, and continues to urge before me, that all of the individuals to whom it has attached the classification of service wire foreman, pole foreman, conduit foreman, cable foreman, and crew leader responsibly direct their crews, within the meaning of Section 2(11). As to this contention, the evidence adduced before me substantially tracks or is cumulative to the evidence in the representation case. Moreover, as to this contention, the evidence as to each particular kind of crew is much the same. Accordingly, *Dickerson-Chapman I*'s finding of nonsupervisory status with respect to four service wire foremen (Freeman, Odess Jones, Miner, and Taylor), two pole foremen (Easterling and Hicks), one conduit foreman (Vernon Wilson Jr.), and two cable foremen (Alford and Lee Field Johnson), strongly points to the conclusion that neither is responsible direction performed by the other individuals who allegedly supervise such crews and whose status was not determined in *Dickerson-Chapman I*. Further, since at least the November 28–30, 1989 representation case hearing,

visors, the legality vel non of the discharges does not affect their evidentiary value in showing the Company's antiunion animus.

[32] In 1988, when the most recent previous raises were given, most of them were 25 cents an hour; some were 10 cents and some 50 cents; and only one $1 raise was given. In 1989, the employees admittedly in the unit received between 15 and 75 cents an hour; the alleged supervisors received 50 cents to $1.05 an hour.

[33] Ben Alford, Kenneth Easterling, J. D. Freeman, James Hicks, Earl Howard, Lee Field Johnson, Odess Jones, Wycliff McPherson, Harvey Miner, Tommy Obie, Elijah Pitchford, Joe L. Smith, Robert Taylor, and Vernon Wilson Jr.

Dickerson-Chapman I also found James Wade to be an employee. However, his ballot was challenged in the March 1990 representation election and was never opened, the complaints do not allege any unlawful conduct as to him until July 1990 and his job classification as of the November 1989 representation case hearing was changed by mid-June 1990. Accordingly, *Dickerson-Chapman I*'s finding that he was an employee is immaterial in the instant case.

[34] *Highland Superstores*, 301 NLRB 199, 207 (1991); *O'Hare-Midway Limousine Service*, 295 NLRB 463, 464 (1989), enfd. 924 F.2d 692 (7th Cir. 1991); *Serv-U-Stores*, 234 NLRB 1143, 1144 (1978); *American Tempering*, 296 NLRB 699, 707 (1989), enfd. 919 F.2d 731 (3d Cir. 1990). As printed in the cited portion of the Board's bound volume 295, the third sentence in the first full paragraph of *O'Hare-Midway*, supra at 464, differs from the sentence as it appeared in the slip opinion as issued. As signed by me and adopted by the Board, that sentence read (emphasis added, footnote omitted):

> With the exception noted in the margin, I perceive nothing in the other portions of the unfair labor practice case record which *adds anything, one way or the other, to the evidence on which* the Regional Director based his finding that drivers of O'Hare-Midway cars are statutory employees.

The printed report omits the emphasized words.

as to the ''foremen'' the company has relied on the job descriptions which it issued with respect to all of them in early November 1989 and which would indicate supervisory power if taken at face value. The little weight accorded to these job descriptions in *Dickerson-Chapman I* (see especially 964 F.2d at 498 fn. 6) strongly points to according them similarly little weight as to all the ''foremen''; indeed, the instant record shows that these job descriptions were issued for the very purpose of providing a paper basis for the company's effort to exclude all of them from the bargaining unit (see infra, part II,E,3). Finally, *Dickerson-Chapman I*'s rejection of the company's contention that the same authority was vested in all individuals to whom the company had attached the same job title points to rejection of that same contention in the instant case. Indeed, even disregarding the approach taken in *Dickerson-Chapman I* (see especially 964 F.2d at 497–498), I do not accept the generalized testimony of Wampler and other management witnesses that all the individuals in each such classification had the same authority, in view of credible specific testimony otherwise.

As to the company's managerial structure and the duties of the workers, *Dickerson-Chapman I* found as follows (964 F.2d at 495–496):

> [The Company] is a ditch-digging contractor that digs ditches, sets poles, and supplies maintenance crews for South Central Bell. At the time of the hearing, there were four persons clearly in management positions: general manager J.M. Stewart, office manager Bryan Wampler, and field superintendents Howard Berry and Robert Ainsworth. The remaining employees were divided into different construction crews: conduit, pole, cable, boring, and service wire crews, each headed by a foreman. Additionally, there were maintenance crews headed by crew leaders.
>
> With respect to the routine work day, the record establishes the following: All of the employees usually report for work around 7:00 a.m. Each of the foremen and crew leaders receive job descriptions or blue prints from one of the managers. The crews then gather the necessary tools and supplies and go [to] the various job sites scattered across the area. For the most part, the laborers are supervised by their foreman or crew leader; the managers do, however, go out to the job sites on occasion. The services performed by the crews are mostly routine and the laborers require little supervision. The foremen and crew leaders spend most of their time operating machinery, but they also perform manual labor alongside the crew members. They are paid hourly wages, but are paid more than the rest of the laborers. The foremen and crew leaders with seniority receive more vacation.

b. *Status before July 1990 of all alleged supervisors*

(1) The supervisory status vel non of all the individuals whose status is in dispute, the following evidence either was not adduced or was incompletely adduced in *Dickerson-Chapman I* but was adduced in the unfair labor practice case

(a) *Relative pay*

Each of the alleged supervisors was paid more than any of the employees whom he allegedly supervised. However, the wages of the alleged supervisors varied within the classification which the Company has assigned to them.[35] Moreover, some of the alleged supervisors were paid less than admitted employees on other crews.[36]

(b) *Paid vacations*

Both ''foremen'' and laborers are entitled to 1 week's paid vacation after 1 year's continuous service. However, laborers are required to take their paid vacation during the week of Christmas or New Year's Day, which days are paid holidays; so far as the record shows, foremen can take their paid vacations at any time approved by the superintendent. Moreover, after 5 years' continuous service, foremen, but not laborers, are entitled to 2 weeks' paid vacation. Under this policy, Lee Field Johnson, Odess Jones, McPherson, and Spiller each received 2 weeks' paid vacation; Wampler was not told by any of them that he was receiving vacation benefits to which he was not entitled.

(c) *Responsibility for productivity*

Beginning no later than September 1984, the Company posted on a weekly basis in the foremen's room a notice which showed the relative productivity (labor costs as a percentage of sales) of each service wire, cable, maintenance, pole, and conduit crew. Each crew was identified by the name of the head of the crew; the notices included no job titles, but named those individuals to whom the Company has attached the job title of foreman or crew leader. Because of Wampler's time constraints, the Company stopped posting these notices in April 1986, although the notice for the week of April 19, 1986, was still on the bulletin board at least as

[35] Thus, the hourly rates of allegedly supervisory service wire foremen varied between $7 (Miner and Odess Jones) and $5 (Taylor); the hourly rate of service wire foreman/admitted supervisor, Parker, was $7. The hourly rates of allegedly supervisory cable foremen varied between $8 (Owens and Spiller) and $5 (Alford). The two allegedly supervisory conduit foremen received $9 an hour (Moore), and $8 (Vernon Wilson Jr.). The two allegedly supervisory pole foremen received $8 an hour (Easterling) and $7.50 (Hicks). The hourly rates of crew leaders varied between $5.75 (Pitchford) and $4.60 (Joe L. Smith).

[36] Alleged Supervisor Joe L. Smith was paid $4.60 an hour; alleged Supervisors Taylor, Alford, and Obie were paid $5 an hour; and employees allegedly supervised by Odess Jones or Stafford were paid between $5 and $5.50 an hour.

late as February 1991.[37] Wampler testified before me that foremen had come to him with complaints that their wages were too low in view of ''the percentage that they were showing,'' and that this had continued to the present ''for the most part.'' I do not credit his testimony in this latter respect, in view of his testimony that the periodic posting of weekly ''percentages'' had been discontinued almost 5 years before he so testified, and in view of the credible testimony of several of the alleged supervisors that they had never been told to hold down labor costs.

(d) *Assignment of radios*

The Company's opposition to the General Counsel's Motion for Summary Judgment in *Dickerson-Champan I* contends that a document received in evidence before me as Respondent's Exhibit 109 ''shows that radios are assigned to foremen, not crews.'' Wampler testified before me in January 1991, as a witness for the General Counsel, that the Company was trying to have all of the vehicles radio equipped, and that the main function of the radios is communication between foremen and the clerks. He testified at the November 1989 representation proceeding that the ''two pole crews do [have radios], because if we have an emergency, we need to be able to get a hold of them on a moment's notice. That was the whole basis for putting in radios in the first place.''

In February 1991, Wampler testified before me on direct examination that Respondent's Exhibit 109 is a listing of who was assigned to each of the Company's various radio units; that virtually all of the people listed thereon are either foremen, crew leaders, or truck drivers; and that the document had been posted ''a minimum of three to five years''—that is, since at least February 1988. On cross-examination, Wampler testified that this list ''would have been made most likely some time between January and April of 1990.''[38] The document includes Elio Victorial as a ''driver''; Victorial was hired about March 1988 as a laborer whose duties did not include driving a truck, was a laborer during an undisclosed period or periods which included October 1989, and about 1989–1990 ''worked as a foreman trainee as [the Company was] trying to train him to be a service wire foreman.'' Turner, who is on this list, was a crew leader between about the winter of 1989 and early 1990, was a laborer between then and June or July 1990, and was a driver as of February 1991. Of the remaining 19 persons listed on this document, about 7 are admitted supervisors,[39] about 3 are drivers not claimed to be supervisors,[40] about 7 are workers found nonsupervisory in *Dickerson-Chapman I*,[41] about 2 are workers whose status *Dickerson-Chapman I* left unresolved,[42] and 1 (Lightscy) occupies a status which is undetermined and is irrelevant to the issues here.

(e) *Hiring*

A majority of the Company's personnel are uneducated common laborers who perform backbreaking work described by Wampler as ''generally menial type.'' The Company experiences a 90- to 95-percent turnover on laborers each year; 75 to 80 of them leave annually, 80–90 percent by quitting. When the Company needs new laborers, Wampler normally telephones the Mississippi Employment Security Commission (the MESC) and requests it to send out a specified number of laborers. Inferentially, the MESC will send out persons who appear capable of performing hard manual labor, and who have either applied for unemployment compensation or requested the MESC's services in finding work. The MESC gives each such person an introduction card which names Wampler as a ''contact person.'' When such a person comes to the Company's facility, Wampler or (in his absence) someone else in the personnel office gives that individual an application form to fill out, takes that application, and instructs him to be out on the front steps of the Company's facility on the next working day at 6:45 a.m., 15 minutes before dispatch time.

Wampler testified before me that the foregoing actions aside, he himself does not get involved with the hiring of such applicants, and at least implied that such hiring is effected by the foremen alone. He testified that before October 1989, when the union drive began, the Company had fewer applicants than vacancies, and Wampler would tell the foreman with the longest existing opening that he had ''better get'' an applicant ''because I have got four more right behind you that would be glad to have him.'' Wampler testified, in effect, that on occasion only one applicant appears on the steps. Wampler further testified in early 1991 that more recently, the foremen inspect the laborers on the steps and hire ''whatever laborers that they need,'' normally on the basis of whether a particular laborer appears capable of doing hard physical labor, whether he is properly dressed for the job, whether he has transportation, and whether he appears likely to come to work regularly and on time. Wampler further testified that the foremen might ask the applicant a few questions, but are ''not usually worried too much about the [written] application.''

As to many of the alleged supervisors, there is no evidence that they have ever had any connection with hiring anyone sent over by the MESC. As to the alleged supervisors, evidence of such connection is summarized under their respective names.

A document posted in the foremen's room in 1984 (a similar version having been posted in 1978) states, inter alia (emphasis in the original), ''The Foreman is responsible for signing up any new men on his crew, for both payroll and insur-

[37] The 1986 lists in evidence include the name of Stafford, Burkes, Spiller, McDonald, Odess Jones, Miner, Freeman, Easterling, Hicks, McPherson, Pitchford, Owens, Wade (who then worked on a cable crew), Lee Field Johnson, Otha Lee Wilson, and Moore.

[38] He so testified after testifying that a particular truck, which was listed as unmanned, had not been manned at the time the list was prepared because of Easterling's death, about January 1990.

[39] Stewart, Berry, Wampler, Ainsworth, Parker, Hayman, and Abel.

[40] Speed, Woodson, and Willis.

[41] Wade, Hicks, Taylor, Freeman, Miner, Joe L. Smith, and Pitchford.

[42] Lee Earl Moore and Owens.

ance. *This must be done before the new man is allowed to go out in the morning*.'' So far as the record shows, all of the paperwork in question is handled by the Company's clerical staff, and there is almost no evidence that the ''foreman'' ever in practice checks into the matter (although see part II,E,2,b(3)(b) infra).

The Company's posthearing brief (pp. 65–66) requests me to reconsider my action in rejecting Respondent's Exhibits 117, 146, 169, and 170, all of which the Company's brief describes as ''summaries of admissible, but more voluminous information,'' and which were offered as probative of the truth of the contents. Rule 1006 of the Federal Rules of Evidence provides, ''The contents of voluminous writings [or] recordings . . . which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation.'' To the extent that these rejected exhibits list as to certain individuals on the Company's payroll their names, dates of hire, dates of discharge, and foremen on hiring, they constitute summaries of company payroll records which, if accurate, would be admissible under Rule 1006.

However, the remaining entries on these rejected exhibits, without which entries the exhibits would not serve the purpose for which the Company wants to use them, do not constitute mere summaries of company records; rather, some of these entries set forth legal conclusions, others turn on testimony by Wampler as to events where he was not shown to have been present and probably was not present (see infra, fn. 43), and others turn on controverted portions of the testimony of company witnesses (mostly Wampler). Thus, although Respondent's rejected Exhibit 146 contains lists of names headed ''Supervisors,'' there is no evidence that any of these individuals has the job title of ''supervisor,'' and whether some of them were statutory supervisors is one of the principal legal issues in this case. Further, although Respondent's rejected Exhibits 117 and 169 are both headed ''Summary of Hires Recommended or Accomplished by Foremen and Crew Leaders,'' the Company does not claim to have any records which show, even indirectly, recommendations for hire made by foremen and crew leaders; the individual entries on these rejected exhibits do not purport to distinguish between actual hiring and recommendations for hire; and whether particular conduct constitutes a recommendation is frequently an issue less than clearcut. Moreover, although Respondent's rejected Exhibits 117 and 146 purport to state that certain named ''foremen and crew leaders'' or ''supervisors'' hired certain named employees, and the heading on Respondent's rejected Exhibit 169 indicates that it includes such information, the documents on which the entries are admittedly based consist of the Company's records as to the crew the employee started work on, although a number of the allegedly supervisory foremen and crew leaders denied hiring such employees (see infra, fn. 45), Wampler's testimony that laborers are invariably hired by the foreman or leader of the crew to which they are first assigned is by his own admission inaccurate as to certain periods, he probably was not present when most of the laborers were hired,[43] and these rejected exhibits state that certain individuals were hired by Stewart, Berry, or Wampler, although none of them was a foreman or crew leader at any material time and these entries were admittedly based entirely on Wampler's memory. Further, Wampler testified that a list of individuals on Respondent's rejected Exhibit 146, which list bears no label on the face of the document, should be designated as ''the supervisor involved in whatever transaction took place . . . the supervisor who was carrying out the activity''; laying to one side Wampler's ''supervisor'' designation, Wampler's explanation makes it almost impossible to determine what these entries are purportedly summaries of.[44]

Accordingly, I adhere to my action at the hearing in rejecting these proposed exhibits as probative of the truth of their contents. See *Soden v. Freightliner Corp*., 714 F.2d 498, 506 (5th Cir. 1983); *U.S. v. Stephens*, 779 F.2d 232, 238–240 (5th Cir. 1985); *James v. Nico Energy Corp*., 838 F.2d 1365, 1373 fn. 7 (5th Cir. 1988); see also *White Industries v. Cessna Aircraft Co*., 611 F. S. 1049, 1069–1070 (Mo. 1985); *Gomez v. National Steel Corp*., 803 F.2d 250, 257–258 (6th Cir. 1986); *In re Snider Farms*, 83 B.R. 977, 983 (N.D. Ind. 1988). Even to the limited extent that such exhibits were rejected by reason of the misleading headings, no different result is called for by *U.S. v. Smyth*, 556 F.2d 1179, 1184–1185 (5th Cir. 1977), rehearing denied 557 F.2d 823 (5th Cir. 1977), cert. denied 434 U.S. 862 (1977). The Court there stated that in resolving a fact issue during a bench trial, the trial court ought to determine whether a summary would add to or detract from the proper weight to be afforded the source documents, and that ''because summaries are elevated under Rule 1006 to the position of evidence care must be taken to omit argumentative matter in their preparation'' (556 F.2d at 1184 fns. 11–12). The Company's contention that company records as to the identity of a laborer's first foreman or crew leader are regularly used by Wampler to find out who hired the laborer apparently relies on his testimony that he so uses them in order to ascertain what position to take as to a laborer's unemployment compensation claim, for which purpose it is immaterial to determine who decided to hire the laborer and whether this decision was made in the exercise of independent judgment.[45]

[43] His testimony indicates that ordinarily, he is not an observer during the period when laborers sent over by the MESC first join a crew being dispatched.

[44] This portion of Respondent's rejected Exh. 146, and a similar and unlabeled portion of Respondent's rejected Exh. 170, are headed ''1990 surplused.'' As whether the laborers under this heading were in fact ''surplused,'' and the connection thereto of the listed ''supervisors,'' see supra at part II,D.

[45] Because these exhibits were rejected when offered, the General Counsel has had no occasion to check against any allegedly supporting documents the accuracy of the entries on the rejected exhibits. Accordingly, no finding as to their accuracy can be made by me. However, I note that some of these entries are inconsistent with, or at least arguably inconsistent with, the received evidence. Thus, the received evidence does not contradict the following testimony: (1) J. D. Freeman's testimony that he did not hire or recommend the hire of Leotis Moss; (2) Joe L. Smith's testimony that he had never hired anyone, or recommended that he be hired; (3) Vernon Wilson Jr.'s testimony that he did not hire Luther Harville, Clark Thompson, Henry Gray, or Ernest Barber; and (4) Otha Lee Wilson's testimony that he played no part in the hire of Darren Carter, John Gary, or Ernest Barber. James Spiller's connection with the hire of Charles Richardson is described, infra, part II,E,2,b(3)(f). Some of the discharges listed on the rejected exhibits are discussed in the following subsequent portions of this decision:

However, in reliance on *Upper Mississippi Towing Corp*., 246 NLRB 262, 271–272 (1979), I will receive Respondent's Exhibits 117 and 169, both of which were authenticated by Wampler, solely in connection with the hire of Henry Kincaid and solely for the purpose of impeaching Wampler's testimony before me that Kincaid was hired by Jewel Owens (see, infra, part II,E,2,b(3)(e)). Respondent's Exhibit 117 states that Kincaid was hired by Hill (who testified for the Company and was not asked about this matter), and Respondent's Exhibit 169 identifies Hill as Kincaid's foreman on hiring, who (Wampler testified) is the foreman who hired the worker in question. I note, moreover, that a ''Declaration'' which was executed by Wampler on February 27, 1990, and was attached to the Company's May 21, 1990 request for review of the Regional Director's Supplemental Decision and certification of representative, likewise states that Kincaid was hired by Hill.

(f) *Filling out of forms*

(i) Timesheets

The Company uses a form captioned ''Daily Labor Report'' which contains a column calling for a list of ''Employees''; a set of columns grouped as ''Distribution-Labor'' with respective headings ''Hourly Rate,'' various ''Job Numbers,'' and ''Total Hours''; another set of columns grouped as ''Cost Distribution''; and a blank calling for the ''Foreman'' and ''Date.'' Wampler testified that all the foremen and crew leaders ''normally'' fill out this form on a daily basis, to the extent that the foreman or crew leader lists the names of each member of the crew (including his own), states the number of hours each has worked, and signs his name in a blank before the printed word ''foreman.'' Spiller credibly testified that although he himself inserted the hours on these timesheets, his wife or a daughter entered the names of the crewmembers and, sometimes, Spiller's purported signature. Employee Robert Lee Bell, who worked on Lee Field Johnson's crew, credibly testified that each worker on the crew wrote his own name, although not his hours, on the time sheet. Some of the other alleged supervisors credibly testified that they themselves performed this timesheet function, and none of them denied performing it.[46] Although Wampler's testimony at least implies that the foremen and crew leaders use these forms to show how each individual's hours should be apportioned between jobs, no such apportionment appears on any of the filled-in ''Daily Labor Reports'' received in evidence; indeed, McPherson and Odess Jones put their hours entries in the ''hourly rate'' column. Spiller (with his female relatives' assistance), Hill and the Wilsons also made, but did not turn in to the office, a separate time record for their respective crews, in order to facilitate resolution of any dispute between the Company and a worker about the number of hours he was to be paid for.

Allegedly discharged employee	*Discussion*
Otis Brown	part II,E,2,b(2)(a)
Claude Watson	part II,E,2,b(2)(b)
Felton Martin	part II,E,2,b(2)(f)
Joe Williams	part II,E,2,b(2)(f)
Lavelle [Graves]	parts II,E,2,b(2)(f), (4)(b)
Charles Williams	part II,E,2,b(2)(i)
Henry Gray	part II,E,2,b(2)(j)
Sedrick Gaines	part II,E,2,b(3)(a)
Claude Bass	part II,E,2,b(3)(b)
Eddie Coleman	part II,E,2,b(3)(g)
Joe Broome	part II,E,2,b(3)(g)
Tyrone Mitchell	part II,E,2,b(4)(e)

[46] Vernon Wilson Jr. credibly testified that he thus filled out a timesheet every day when working with a conduit crew and when he was ''running a backhoe out there, pulling a backhoe from job to job.''

(ii) Daily work reports ''A''

The disputed individuals to whom the Company gave the job description of cable foreman are: Alford, Burkes, Hill, Lee Field Johnson, McDonald, McPherson, Obie, Owens, Spiller, and Stafford. Wampler testified that cable foremen ''normally'' fill out and turn in a form headed ''Daily Work Report/Misc. Exhibit 'A' Work,'' and that it is their responsibility to fill them out or provide the necessary information to fill them out. The ''Daily Work Report A'' calls for entries under ''Authorized by,'' ''Location of Work,'' ''Footage,'' ''Type & Pair,'' ''Reel Number,'' ''Junked,'' ''Depth,'' ''Cable Readings'' (''Began With'' and ''Ended With''), ''Asphalt—Gravel—Concrete—Sod—Removed and Replaced,'' and ''Miscellaneous Items''; a list of the amount of cable used and left at each location; and a list of ''Closures & Markers with Locations.'' The printed word ''Foreman'' appears at the end of the form following a blank for a signature. Wampler testified that the Company uses these documents for billing purposes.

Wampler testified on direct examination that since a cataract operation some time after June 1989, Lee Johnson had been able to fill out company timesheets and other forms very accurately and very well; on cross-examination, Wampler corroborated Johnson's testimony that he never filled out these forms, but instead gave written notations and oral reports to office personnel who in turn filled out these forms.[47] However, Wampler testified at this point that all the other ''cable foremen'' filled out the actual forms. Immediately thereafter, he testified that as to these ''A'' forms and the ''Daily Work Report/Misc. Exhibit 'B' Work'' forms, the forms bearing Spiller's name were filled out by Berry on the basis of Spiller's oral reports and notations on the blueprint. Wampler testified that certain ''A'' forms bearing October 1989 dates (and also certain ''B'' forms) were partly written by McPherson, and partly written by someone else (mostly Berry) on the basis of information provided by McPherson. McPherson testified that he did not fill out any of these forms and that Field Superintendent Berry filled them out on the basis of McPherson's oral and informal written reports to Wampler. All the handwriting on the forms attributed to McPherson appears to be written by the same person, and resembles the handwriting on the photocopied similar forms (which bear Spiller's name) received in evidence as Respondent's Exhibit 126, which Wampler testified were filled in by Berry. Moreover, McPherson undisputedly inserted the handwritten entries on the original documents of which photocopies were received into evidence as Respondent's Exhibit 77; and although the photocopies are extraordinarily poor, they do not appear to reflect handwriting by the same person who wrote Respondent's Exhibit 125 (see particularly the

[47] Wampler and Ainsworth testified that Lee Field Johnson attributed to vision difficulties his failure to fill out these and other forms. Johnson testified to possessing only limited literacy.

figure 8s). For these and demeanor reasons, I credit McPherson.

As to the remaining cable foremen, Wampler's testimony is uncontradicted, and his unreliability as to Lee Field Johnson and McPherson does not appear sufficient to warrant disbelieving Wampler as to the other cable foremen.[48]

(iii) Daily work reports ''B''

Wampler testified that a form captioned ''Daily Work Report/Misc. Exhibit 'B' Work,'' and variously identified in the record as General Counsel's Exhibit 21-B and Respondent's Exhibit 11-C, ''is used by mainly the conduit crews . . . it is mainly used by most of the foremen and crew leaders.'' Before me, he testified:

> The foreman will normally put down the location of work, what type of work he was doing, how many hours of [himself] and his employees are involved, how much equipment he has used, and any other necessary information that we might need to be able to bill this particular type of work.

At the November 1989 representation case hearing, Wampler testified that foremen or crew leaders have been responsible for filling out this form ''for several years,'' and that, inter alia, they ''allocate the number of hours that they had on this job to the various categories of laborer . . . list what equipment they have used and how long; and, optionally, they can put down what employees they have used.'' Wampler testified before me that under ordinary conditions, nobody but foremen or crew leaders fills out this form, that it is ''normally the foreman's responsibility to either provide this or provide the necessary information for it,'' and that if it is not filled out, the Company does not get paid for the work involved.

Otha Lee Wilson, to whom the Company gave the job title of conduit foreman in March 1990, credibly testified that he did not fill out such forms until midsummer 1990, when Wampler told him to start filling them out. Vernon Wilson Jr., the only conduit foreman whom *Dickerson-Chapman I* found nonsupervisory, testified that he had seen that form but never used it. Because the Company failed to produce any such documents filled out by Wilson, and for demeanor reasons, I credit his testimony in this respect. The record includes copies of this kind of form filled out by Hill,[49] McDonald, Obie, and Otha Lee Wilson.[50] As previously found, these forms were not filled out by Johnson, Spiller, or McPherson (see part II,E,2,b(1)(f)(ii), supra).

(iv) Buried service wire forms—service wire foremen

Wampler testified that service wire foremen fill out certain portions of a form captioned ''Buried Service Wire'' so as to show what work order the crew is working on, what type of work it has done on that particular order, and ''any other pertinent information that might be required.''[51] The document calls for a signature by the ''Foreman,'' and the signed approval of the ''supervisor.'' Of the alleged supervisors, Freeman, Odess Jones, Luckett, Miner, Taylor, and Otha Lee Wilson are classified by the Company as service wire foremen. As to Odess Jones, Wampler's testimony about the buried service wire forms was corroborated by Jones at the representation case hearing. Moreover, the record contains such forms turned in, and probably filled out, by Luckett, Miner, and Taylor.[52] I accept Wampler's testimony as to all such ''service wire foremen'' except Freeman. However, for demeanor reasons, I credit Freeman's testimony (partly corroborated by Odess Jones' testimony at the representation hearing), that as to Freeman's crew, this type of form has always been filled out (including the blank for his purported signature) by someone else on his crew or ''They often let one of the secretaries fill it out for me.''

(2) The alleged supervisors found to be employees in *Dickerson-Chapman I*, the following evidence was not adduced in *Dickerson-Chapman I* but was adduced in the instant unfair labor practice case

(a) *J. D. Freeman*

The Company contends that J. D. Freeman discharged or effectively recommended the discharge of laborer Otis Brown Jr. on June 6, 1990, after the Union's certification.

The Company has a practice of entering personnel information on the back of the employee's attendance form. Initially, after being shown Brown's attendance form, Wampler testified on direct examination that Brown ''was fired on [Freeman's] recommendations,'' without any independent investigation to get Brown's side of the story; and that Freeman told Wampler that Freeman wanted him to fire Brown because Freeman was having trouble with him on his attendance. Later on direct examination, after being shown other portions of Brown's personnel records, Wampler testified that Freeman fired Brown. Immediately after so testifying, Wampler testified (emphasis added):

> [T]hey went ahead and took action on [Brown]. I was not personally, I don't think, involved in the exact actions. And I had left [word] with our payroll clerk, Linda [Shaw]. And she needed to get in touch with [Freeman] and get . . . the attendance record information from [Freeman] in order to support what actions *they* had done.[53]

[48] Alford, Burkes, McDonald, and Owens did not testify in either the representation or the unfair labor practice hearing. Obie testified only at the representation hearing, a day or two after being told that he had a new job of cable foreman.

[49] This document is dated July 19, 1990, about 2 weeks after the safety meeting. As of January 1991, Hill was a service wire foreman.

[50] This document is dated July 19, 1990. After October 1990, Wilson was a service wire foreman.

[51] Part of Wampler's quoted testimony is directed to a document marked for identification as R. Exh. 11-D but never offered into evidence as such. The record shows that this document is the same as G.C. Exh. 21-C.

[52] The record also contains such a form turned in by Ronald Johnson, whom the Company classified as a bore foreman.

[53] Wampler so testified when authenticating an undated note, in his handwriting, which states, ''Linda/We need 1990 attend record to support J. D's action concerning this employee.'' Wampler testified that he did not know whether ''Linda'' (inferentially, payroll clerk Linda Shaw) ever received this information from Freeman. The back of Brown's attendance form contains a note in Wampler's handwriting, either undated or with a date of April 25, 1990, which states, ''Linda/Note the final warning in Otis Brown's file/per JD.''

On the back of Brown's attendance form is a note, in Wampler's handwriting and with his initials, which states, ''J. D. Freeman informed me that he was giving his employee Otis Brown final warning ['one last chance'] *this morning*, for entry into his [personnel] record'' (emphasis added). Although this notation is dated April 25, 1990, an entry on Brown's attendance form states that he received a ''final warning'' during the week ending Saturday, April 21.[54]

In view of this unexplained discrepancy in Brown's personnel records, in view of Wampler's inconsistencies and eventual failure of memory as to the circumstances of Brown's discharge, and for demeanor reasons, I credit Freeman's testimony that he did not fire Brown or recommend that he be fired; that ''some days he would taken off, and they just told me one day he was going to have to let him go''; and that Freeman did not tell Wampler, as to Brown's attendance, ''Well, I will give him one last chance.'' I note that Brown's attendance would likely be of limited concern to Freeman, in view of his testimony that his crew consists of only two individuals including him, and when the other man is absent Freeman goes to Wampler or Stewart ''and [I] tell them I need a man to go with me.''

Freeman credibly testified that he had heard Company Vice President Stewart, after he had got a new man for Freeman's crew, tell that man that Freeman was going to be his ''boss.''

(b) *Earl Howard*

In contending that Earl Howard was a supervisor, the Company relies on his connection with the discharge of Claude Watson on May 14, 1990, after the Union's certification. Wampler wrote on Watson's attendance form that he had been fired because of ''Failure to come to work on regular [and] consistent basis.'' The attendance form itself shows that Watson had been absent, for unknown reasons, on two occasions, including May 10, in about 2-1/2 months. A notation by Wampler on the back of Watson's attendance form and dated May 15, 1990, states that on May 11, 1990, Earl Howard had advised Wampler that Howard intended to replace Watson because of his continuing tardiness and absence problem; and that Wampler ''told Mr. Howard I considered his decision very appropriate, and advised him on the proper procedure for carrying out his intentions. Mr. Howard subsequently replaced Watson on the following Monday 5/14/90 and left Watson to be terminated.'' Wampler testified to having little independent recollection of this incident, and Howard did not testify. Wampler's testimony that Howard fired Watson is inconsistent with Wampler's memorandum, which as to this matter I regard as more reliable than his testimony. Wampler testified that Howard expressed concern with Watson's tardiness, as well as his attendance. Wampler further testified that Howard said that ''he wanted to do something about the situation,'' and that before Watson was fired, no company official made any independent investigation or got the employee's side of the story. I credit the testimony of Wampler summarized in the two preceding sentences. However, I do not regard Wampler's memorandum as probative regarding whether Howard played a role in selecting Watson's replacement.

(c) *Lee Field Johnson*

Lee Field Johnson testified before me on January 7, 1991, that he got in charge of a crew ''four or five years, or less, ago''; at the representation case hearing, he testified that he had been filling out for 10 or 12 years daily labor reports which he signed in a blank which was followed by the printed word ''foreman.''

Johnson testified before me that on November 2, 1989, he had been told by Wampler that Johnson could hire or fire people. This is shown, in effect, in the representation case record which underlies the conclusion in *Dickerson-Chapman I* that Johnson was not a supervisor.[55] He further credibly testified before me that he had been told by various supervisors over the years, that if a man on his crew would not work, ''run him off.''

The Company contends that Johnson discharged or effectively recommended the discharge of laborer Ian Griffiths. On October 6, 1986, Johnson and two other persons in the Company's employ were riding as passengers to a jobsite in a company truck driven by Griffiths, referred to in the record as ''Snow White'' because of his blond hair. After an argument with Johnson about whether, to reach the jobsite, Griffiths should have turned at a particular intersection, Griffiths grabbed Johnson around his neck a couple of times. Johnson reached for his pocket, where he thought (mistakenly) he had a knife, and told Griffiths to pull over so Johnson would not kill him. Griffiths did slow down, whereupon Johnson got out of the truck and told the other passengers to do the same ''so they did not get killed.'' Then, all three walked to a pay phone, from which Johnson telephoned Field Superintendent Ainsworth's office and reached Ainsworth's secretary. Johnson told her to tell Ainsworth that Johnson needed him out there, and told her where the workers were waiting. When Ainsworth arrived, Johnson told Ainsworth the location of the job the crew was heading for and the route that Griffiths wanted to take, and further said that Griffiths had ''jumped on'' Johnson. Ainsworth asked where the truck was. Johnson said that Griffiths ''is running up and down the streets in it is all I know.'' At Ainsworth's instructions, the three waited at the telephone booth until another company worker, ''Freddie,'' arrived with another Company truck. ''Freddie'' drove the three workers back to the Company's facility; they never did reach the jobsite they had originally been dispatched to.[56]

[54] This entry appears after the printed entry ''Week/Ending/April 21, 1990'' and in a column headed ''Memo.'' The entries for that week state that Brown was absent for unknown causes on Monday, April 16, and Tuesday, April 17, and contain an asterisk in the square for Wednesday, April 18. On a portion of the form which does not call for any entries, Wampler's memorandum (with the April 25 date and his initials) is copied in a handwriting which is not Wampler's and appears to be the same as the handwriting of the ''final warning'' entry.

[55] More specifically, the representation case record shows that on November 2, Wampler read to Johnson the cable foreman job description, which states that he had such authority.

[56] My findings in this paragraph are based on Johnson's undisputed testimony at the representation case and unfair labor practice case hearings. Johnson was the only individual with firsthand knowledge of these events who testified about them. Ainsworth testified for the Company before me, but was not asked about the ''Snow

Continued

The back of Griffiths' attendance form contains an undated notation by Wampler which states, in part, ''Disobeyed instruction on route to job/went up I-55 instead of 220 a closer route.[57] Foreman tried to give directions. Employee reached over to grab Foreman as a gesture of intended violence.'' Griffiths' application for unemployment compensation states that he was discharged because of ''Disagreement with foreman.'' The Company's response, filled in and signed by Wampler, states that Griffiths had been terminated on October 6, 1986, for ''Gross Misconduct in connection with work. Employee physically [assaulted] his supervisor. Also Insubordination, Absence without leave, misconduct in connection with work in regards to carelessness and negligence.''

At the representation case hearing, Wampler testified that Johnson ''had [Griffiths] brought in and fired, and we fired him.'' At the hearing before me, Wampler initially testified that Johnson fired Griffiths and ''after [Johnson] got rid of the man, [Johnson] came in and basically told me the details of what had happened.'' Wampler then testified that after leaving the truck being driven by Griffiths, Johnson ''called in and got ahold of Bob [Ainsworth] and myself and everybody else to tell us what had happened and what needed to be done. And in the meantime, the man had [come] into the yard, and subsequently, he was fired''; Ainsworth testified for the Company but was not asked about this alleged conversation with Johnson. Wampler then testified that during this telephone conversation, Johnson was ''extremely angry'' but did not specifically say that he wanted Griffiths fired. Finally, when company counsel asked Wampler, ''Before you fired him, did you make any independent investigation or get [Griffiths'] side of the story?'' Wampler merely said ''No,'' without indicating either that counsel was mistaken in assuming that ''you fired'' Griffiths or that he was fired by Johnson before Johnson reported the incident to Wampler. In view of these internal inconsistencies in Wampler's testimony, and in view of the demeanor of Wampler and Johnson when they testified before me, I discredit Wampler's testimony that Johnson fired Griffiths, that Johnson recommended Griffiths' discharge, and that Johnson reported Griffiths' conduct to Wampler. Rather, I credit Johnson's testimony that aside from his conversation with Ainsworth at the telephone booth, Johnson did not discuss the Griffiths incident with any of Johnson's supervisors before he learned that Griffiths had been discharged; that Johnson never discussed the incident with Wampler; that Johnson did not discharge Griffiths or recommend his discharge; and that when Johnson returned to the facility at the end of the day when this incident occurred, he anticipated that Griffiths would be back to work the next morning. Further, I credit Johnson's testimony that the morning after Griffiths' discharge, ''they'' asked Johnson what had happened, to which Johnson replied, ''I don't know . . . I guess the guy went crazy.''

The Company contends that Johnson effectively recommended the discharge of laborer James D. Wallace. Wallace's attendance form contains entries by Wampler stating that on May 22, 1987, Wallace was discharged for ''failure to carry out assigned duties. Employee was directed to make ice water for crew at the beginning of each work day by his Foreman Lee Field Johnson . . . . Employee refused to carry out duty even when directed by Supervisor [or, perhaps, 'Supervision'] R. B. Ainsworth.'' Wampler credibly testified that ''They normally make ice water for the crews at the beginning of the day.'' He further testified that Johnson recommended Wallace's discharge to Ainsworth, who discharged Wallace. However, Ainsworth when testifying for the Company was not asked about this incident, there is no evidence that Wampler was present during either the Wallace incident or the alleged Johnson-Ainsworth conversation, and independent of Wampler's entry in Wallace's file, Wampler had little or no recollection of these matters. Johnson was not specifically asked about this incident, which occurred more than 3 years before he testified, but testified generally that he had never discharged anyone or recommended anyone's discharge. For demeanor reasons, I accept Wampler's testimony about this incident only to the extent that such testimony is corroborated by his written entry.

As discussed, supra, part II,D, in August 1990 Lee Field Johnson and two members of his crew (Calvin Carr and Robert Bell) were transferred to other crews, in connection with a reduction in force occasioned by lack of work. Wampler testified that when Johnson, who after his transfer had been working as a laborer, was restored to his position as cable foreman, he ''called back'' or ''requested'' two individual crewmembers (Carr and Bell) who had previously worked on Johnson's crew, that Johnson's request was honored by the Company, and that this is the traditional practice. Johnson testified that Wampler asked Johnson whether he wanted to try new men on his crew; that Johnson said that he, Bell, and Carr had been working together all the time; and that Johnson said that he would rather have them. As to the conversation involving Bell and Carr, for demeanor reasons I credit Johnson.

Linden Hill, who has worked for the Company since about January 1987, testified for the Company about two incidents, allegedly involving Johnson, whose dates Hill was not asked to give. Thus, Hill testified that employee Bobby Weaver quit because Lee Field Johnson worked him so hard. Johnson testified that Weaver had come to work late with a toothache and a towel wrapped around his head; that ''they'' would not let him go back on the truck; that Weaver was fired, that Johnson had not known that ''they'' had fired Weaver until Johnson returned to the facility that afternoon; and that Johnson did not recommend Weaver's discharge or tell him that he was discharged. Wampler testified at the November 1989 representation case hearing that Johnson's men ''always stay with him or else they quit. And they like working for Lee Field.'' In view of Wampler's testimony in this respect, because Weaver's personnel records were not produced, and for demeanor reasons, as to the Weaver matter I credit Johnson. In addition, Hill testified that Johnson told employee Charlie Hurst to get off Johnson's truck, and get on another one the next day, after ''a rough argument'' following Hurst's action in cutting a cable. Hill went on to testify that Hurst in fact got off Johnson's truck and got on another one. Johnson denied making Hurst get off a job because he cut a cable, or for any other reason. For demeanor reasons, I credit Johnson.

Ainsworth testified that Johnson had the authority to give time off to laborers under him, and that from time to time

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White'' incident. In describing this incident, the Decision and Director of Election attributes Ainsworth's conduct to Berry.

[57] Johnson testified, in effect, that the crew's destination was in a direction opposite to the route taken by Griffiths.

he has reported to Ainsworth that Johnson had granted time off to men. As to one such laborer, Charles Williams, Ainsworth testified that Johnson would approach Ainsworth and said that Johnson ''is letting'' Williams off, and that thereafter Williams would approach Ainsworth and say that Johnson had given Williams permission to take time off; Williams so advised Ainsworth before taking the time off, if Ainsworth ''was around,'' and afterwards if he was not. Johnson denied going Williams time off without first checking with Ainsworth. For demeanor reasons, I credit Ainsworth. In addition, Ainsworth credibly testified that he had heard Johnson called ''boss man'' by Company employees including laborer Charles Williams.

(d) *Odess Jones*

When signing a ''showing of interest'' form for the Union on October 25, 1989, Odess Jones listed his job as ''foreman.''

(e) *Wycliff McPherson*

When signing a showing-of-interest form on October 25, 1989, Wycliff McPherson listed his job as ''foreman.''

(f) *Elijah Pitchford*

The Company contends that Elijah Pitchford effectively recommended the discharge of Felton Martin and Joe Williams after the representation election.

Felton Martin's attendance form states that he was discharged on May 9, 1990, for ''Failure to come . . . to work on a regular [and] consistent basis.'' On the back of his form is a memorandum written by Wampler, and dated May 10, 1990, which states, in substance, that on several occasions Wampler had spoken with Pitchford about Martin's attendance record, that on each such occasion Pitchford had said he would talk to Martin and try to gain improvement, and that Pitchford's reason for tolerating Martin's attendance was his hard work at the jobsite. The memorandum goes on to say that after Martin had been absent on two consecutive days, ''I think [Pitchford] just got tired of putting up with Martin's continued absences. When I asked [Pitchford] about the situation he gave his approval to terminate. Martin was subsequently terminated.'' Wampler testified that Pitchford ''grew tired'' of Martin's irregular attendance, that Pitchford ''finally turned him [in] for termination,'' and that the Company followed Pitchford's recommendation without making any independent investigation to get the employee's side of the story; Martin's attendance record shows that of about 94 workdays in 1990 before his discharge, he missed about 13 days because of unexcused absences or absences for unknown causes. Pitchford did not testify. For demeanor reasons, I regard Wampler's memorandum as more reliable than his testimony.

Wampler testimonially authenticated certain documents from the personnel file of Joe Williams. These documents include his annual attendance record form, which states that he was fired on August 22, 1990, for ''Failure to carry out assigned duties [. See] attached report.'' The report in question, which is dated August 21, 1990, was written by Wampler, and bears Elijah Pitchford's at least purported signature, states that ''Williams would not work all day, stayed in truck and slept . . . . Had driven stakes [at] Highway Patrol left hammer at jobsite got back in truck [and] slept.'' When authenticating these documents, Wampler testified that Pitchford had reported as to Williams an incident substantially like the incident described in the written report, that Williams was fired ''for failure to carry out his assigned duties . . . [Pitchford] had us fire him,'' and that Williams was fired without any independent investigation, and ''just strictly on [Pitchford's] report.'' When asked about this incident on cross-examination, and without these documents in front of him, Wampler testified that Pitchford had reported that on the way to a ''cable trouble'' job (inferentially, an emergency job which came up at the usual end of the workday), Williams refused to go to the job but, instead, got off the truck being driven by Pitchford and returned to the Company's facility in a truck being used by another crew. Wampler testified that Pitchford ''was rather angry . . . called in on the radio and said what he wanted done . . . because he was some kind of hot about it. He was on his way to cable trouble, and that is something you don't do.'' Wampler went on to testify that he did not talk to Williams; ''We never talk to laborers on things like that.'' Because as to the Williams discharge incident there is almost no resemblance between Wampler's direct testimony and his testimony on cross-examination, I regard such testimony as without probative value. As to that incident, the only probative evidence is the documents in Williams' file, which documents fail to show whether Pitchford made any recommendations as to Williams.[58]

(g) *Joe L. Smith*

The Company contends that Joe L. Smith and George Jones effectively recommended the discharge of laborer Lavelle Graves, and that Smith and Linden Hill effectively recommended the discharge of laborer David Cottrell; both of these discharges were effected after the close of the representation case hearing.

As to the discharge of employee Lavelle Graves on May 28, 1990, Wampler was unable to testify until after reading his notation on Graves' attendance form. Read together, Wampler's notation and testimony are to the following effect: bore Foreman George Jones told Wampler that Jones was dissatisfied with the work pace of Graves, who was then on Jones' crew, and suggested Graves' transfer to another crew. Wampler knew that Joe L. Smith had a vacancy on his crew, and ''offered'' Graves to Smith, who agreed to give Graves a try. About 5 minutes later, and before dispatch time, Smith told Wampler that Graves had refused to go out that day because it was raining, a condition which the Company does not regard as excusing a maintenance crew from working, and that Smith ''had no use for'' Graves. At this point, Wampler ''turned him over for termination'' without making any independent investigation, and ''strictly'' on the basis of what Smith and Jones had told Wampler.

Smith credibly testified that he did not remember Graves, and that Smith did not hire him, fire him, or recommend that he be fired. Jones testified for the Company, but was not asked about this incident. Jones, a bore foreman with the Company for a total of about 9 years, testified that ''normally'' men are fired after they have received two or three different ''chances'' and have been brought in by two or

[58] See also, infra, fn. 60.

three different foremen. Wampler testified that when a foreman brings a man in and expresses dissatisfaction with him, in deciding what action to take Wampler regards the foreman as having made a ''serious statement.''[59]

Before February 6, 1990, laborer David Cottrell was on Hill's crew. On that day, Hill told Wampler that Hill had been having trouble with Cottrell's attendance, and wanted someone who would come to work more regularly, but that Cottrell was a pretty good worker and Hill wanted to try to give Cottrell another chance if the Company could put him somewhere else where his poor attendance would not be objected to. Wampler described the problem with Cottrell to Smith, who had a vacancy and said that he needed a man badly enough to take a chance on Cottrell. Then, Smith told Cottrell to get on the truck and get ready to go. By this time, a light drizzle was falling. Cottrell told Smith that Cottrell did not want to work in the rain, whereupon Smith told Wampler that Cottrell was not going to work in the rain, and ''they'' gave Smith another man. Wampler wrote on Cottrell's attendance form that after Cottrell stated that he did not want to work in the rain, Smith ''refused to continue acceptance of employee. No other crew willing to accept, decision to terminate employee. . . . Employee fired 2–6–90 failure to work on a [regular] and consistent basis.'' Wampler testified that he did not make any independent investigation concerning Smith's complaint that Cottrell would not work, and ''That was strictly based on what [Smith] told me. He said he didn't need that man, and I understood what he wanted.''

Smith also fills out portions of a form, otherwise filled out by South Central Bell representatives, which authorizes an amount of certain kinds of work, referred to in the record as ''Exhibit B'' work, for which South Central Bell will accept billing. This form contains the Company's only source of information on the work described on the form.[60]

(h) *Robert Taylor*

In contending that Robert Taylor is a supervisor, the Company relies on his alleged connection with the discharge of Roderick Kyles after the Union's certification. An entry by Wampler on Kyles' attendance form states that he was ''fired 6–15–90 failure to come to work on a regular and consistent basis by R. Taylor.'' When authenticating this entry on direct examination, Wampler testified that during a discussion with Taylor about Kyles' poor attendance, Taylor said that Kyles was getting to be a problem; Wampler asked whether Taylor wanted to put up with this any more, or to do something about it; Taylor ''made indications that he would rather have somebody else''; and ''based on [Taylor's] decision, we went ahead and terminated him.'' Wampler's entry is written at the bottom of Kyles' attendance sheet, which shows that during the approximately 42 working days between his hire and his discharge, he had been absent on about eight occasions—two of them because of sickness, and the rest for ''unknown cause''; Wampler testified that he made no independent investigation to get the employee's side of the story. On cross-examination, Wampler testified that he could not remember whose crew Kyles was on (''I can't remember apart from the record'') and that Wampler could remember nothing about the incident other than the fact that Kyles was terminated. Taylor did not testify. I conclude that the record fails to contain any credible evidence that Taylor played a part in the Company's decision to terminate Kyles.

(i) James Wade

James Wade was classified by the Company as a ''driver/foreman'' as of November 4, 1989, but as a ''pole foreman'' by June 19, 1990. On that day, Wade called Wampler out to the jobsite. When Wampler arrived, Wade told him that Wade had expressed to laborer Charles Williams anger at his perceived poor work, thereby causing Williams to hit Wade with a ''sharpshooter'' (a narrow-bladed shovel). Wampler's memorandum on the back of Williams' attendance record states that Williams was directed to bury something at greater depth or he ''would be taken in to be fired,'' the last three words having been inserted between that and the next sentence after the first sentence had been completed and the second sentence had been started; Wampler's testimony about this incident contains no such allegation. Wampler testified that when he reached the job site, Wade said, ''I want this man fired, get him off my jobsite''; Wampler's memorandum contains no such allegation. Wampler's memorandum states, ''Foreman discharged employee 6/19/90. Wages paid 6/20/90.'' However, the front page of Williams' attendance form states that he was discharged on June 20.

I credit Wampler's testimony that he himself fired Williams, without making any independent investigation to get Williams' side of the story; Wampler's testimony in this respect is more consonant than is his written notation with the discharge date on Williams' attendance form and with Wampler's testimony about being called to the jobsite and told about Williams' conduct. Because the reference to the alleged discharge threat was written later than at least the first part of the memorandum and was not referred to in Wampler's oral testimony, I do not find that such a threat was made. Because the memorandum does not state that Wade said he wanted Williams to be discharged, and for demeanor reasons, I do not credit Wampler's testimony that Wade said this. However, I do credit Wampler's testimony that Wade said, ''Get [Williams] off my jobsite.''

(j) Vernon Wilson Jr.

On a ''showing-of-interest'' form signed for the Union on October 25, 1989, Vernon Wilson Jr. listed his job as ''foreman.'' Wampler testified on November 30, 1989, at the representation case hearing that he was not aware that Vernon Wilson Jr. had ever hired or had the need to terminate anyone. At the time of that hearing, Wilson was working as a back-hoe operator. Although Wampler testified before me that as of July 1990 Wilson Jr. had been a conduit foreman ''probably three months or less,'' Wampler testified at the representation case hearing that the job description of conduit

[59] I credit this much of his testimony. However, I do not credit his further testimony that he feels bound to follow a discharge recommendation by a foreman who has brought the employee in, in view of Wampler's further testimony that in order to limit its unemployment compensation taxes the Company attempts to avoid discharges for ''marginal'' reasons which would not amount to gross misconduct under Mississippi law; ''On a marginal thing . . . a lot of time, they will circulate it around a little bit to make sure there is plenty enough evidence to justify the termination.''

[60] At least one such form was also filled out by Pitchford on July 17, 1990.

foreman had been given to Wilson for his signature in November 1989, Wilson testified that before November 1989 he had led a conduit crew, and his timebooks suggest that he resumed leading a conduit crew about mid-February 1990.

The Company contends that Wilson discharged or effectively recommended the discharge of Henry Lee Gray. On February 6, 1991, at the hearing before me, Wampler authenticated an entry by him on Gray's attendance form, that Gray had been ''fired 4/24/90/refused to get in and dig/refused to carry out assigned duties/General indolence/ decision to terminate/V. Wilson, Jr.'' Further, Wampler testified before me that Wilson Jr. ''turned [Gray] up for firing,'' and that Gray was fired without Wampler's getting Gray's side of the story. Gray's attendance form shows that he was absent, for unknown causes, on Wednesday, March 28, on Tuesday and Wednesday, April 14 and 15, and on Monday, April 23. Wilson testified that on each day when Gray was absent, Wilson had gone to Field Superintendent Ainsworth, an admitted supervisor who was Wilson's immediate superior, and asked for a man to fill in for Gray, and that on each such occasion, Ainsworth asked where Gray was. Wilson went on to testify that Ainsworth keeps up with who works and who does not; that when Gray showed up for work, following a 1-day absence, Ainsworth asked Wilson what he wanted to do with Gray; and that Wilson replied that Ainsworth should do whatever he wanted to do with Gray. Because Ainsworth was not asked about this incident, and for demeanor reasons, I credit Wilson.

Wampler's testimony and an entry by him on James Blackwell's attendance form state that when Blackwell (an employee since April 1990) showed up for work on July 19, 1990, after a 4-day absence due to being in jail, Wampler (according to his entry), or ''we'' (according to his testimony) told Wilson that Blackwell had previously had a poor attendance record, and that Wilson could either let him go for poor attendance or give him another chance if Wilson believed Blackwell was good enough. Wampler's testimony and entry further state that Wilson said Blackwell was a pretty good and pretty hard worker and that Wilson ''would go ahead and give him another chance and give him a try at it [. Wilson] did agree to take him on back''; Wampler testified that this was Wilson's decision to make and Wampler accepted it. Wilson testified that on Blackwell's release from jail, Ainsworth wanted to get rid of him, but agreed to keep him after Wilson said he was a good worker and should be given another chance. For demeanor reasons, and because Ainsworth was not asked about this incident, I credit Wilson.

The Company contends that Wilson effectively recommended the hire of various laborers between March and June 1990. Wilson credibly testified, in effect, that he had nothing to do with the hire of laborers Luther Harville, Henry Gray, Clark Thompson, or Ernest Barber; his testimony in this respect is not contradicted by the received evidence. As to the hiring of Lavone Biggs, Wilson testified that when working for another employer, Wilson had seen that Biggs was a good worker; that about the third week in June 1990 Biggs had seen Wilson in the Company's office and asked him if work was available; that at that time Wilson's crew was short a man; and that (without deciding between him and anyone else) Wilson asked Ainsworth to hire him and assign him to Wilson. Ainsworth did so; as a witness for the Company he was not asked what weight, if any, he attached to Wilson's statement to him. Wilson credibly testified before me that on an undisclosed number of occasions—which he dated as after the union activity began in mid-October 1989, and which probably took place after the October 30, 1989—mid-February 1990 hiatus in his assignment as conduit foreman—when he was short a man, Ainsworth or Berry would tell him to pick a man from those on the front steps and get him signed up (see, supra, part II,E,2(b)(1)(e)). On a date not specifically shown by the received evidence, but probably after February 1990, Field Superintendent Ainsworth told Wilson to ''go get a man . . . with some transportation.'' Wilson asked Redale Robinson, who was standing on the front steps (see, supra, part II,E,2,b(1)(e)), whether he had transportation. Robinson said, ''Yes,'' and was hired. Wilson's testimony suggests that nobody else was standing on the steps that day, and there is no other testimony about this matter. On a date not specifically shown by the received evidence, but probably after February 1990, Wilson, who needed a third man on his crew, was told to pick out a man (inferentially, from those on the front steps) and take him in the office to be signed up; Wilson took this action with respect to Steve Ranson, who (inferentially) then joined Wilson's crew.

(3) The supervisory status vel non of the individuals whose status was litigated but not determined in *Dickerson-Chapman I*, the representation case record plus the unfair labor practice case record, taken together

(a) *William Burkes*

William Burkes did not testify. Wampler testified at the November 1989 representation case hearing that Burkes had never to Wampler's knowledge hired or fired anyone; and that Burkes had transferred at least one, and probably two, men with whom he had had ''problems'' probably involving indolence, whose identity Wampler could not recall. Wampler testified before me that he and Ainsworth gave Burkes the cable foreman's job description in November 1989 and discussed it with him in detail, that Burkes agreed it was an accurate description, and that he signed it.

The Company contends that after the Union's certification, Burkes effectively recommended the discharge of laborer Sedrick Gaines. Wampler initially testified that he accepted Burkes' recommendation that Gaines be fired and fired him, and subsequently testified that he himself ''was not directly involved in any of the termination process.'' Gaines' attendance form contains an undated notation by Wampler, ''Employee fired 7/19/90/Failure to come to work on a regular and consistent basis. Turned over for termination by W. Burkes.'' Gaines' attendance record shows that during the approximately 30 working days between his hire and his discharge, he was absent for unknown cause on at least 4 days and had an unexcused absence the day before his discharge. His personnel file also contains a note from Wampler dated September 5, requesting ''Linda'' (inferentially, Linda Shaw) to ''Find the attendance record for Gaines. I think William fired him for attendance but confirm.''

(b) *Linden Hill*

Linden Hill received the job description of cable foreman in both November 1989 and July 1990, but he testified be-

fore me, in January 1991, that he was then working as a service wire foreman. As a company witness, Hill testified that he has been a foreman since about the middle of 1987. As a cable foreman, he had two others on his crew; as a service wire foreman, he had one other.

Hill testified before me that as a cable foreman, he had ''fired'' about 30 men; if true, this would mean that more than half the discharges during this period of time were effected by Hill. He further testified that he could recall the names of 2 of such men, whom he testimonially identified as W. C. Harper and (according to the transcript) ''Sammy Arvon [phonetic].''

When shown the attendance form of ''Sammie Demon Armon,'' Wampler testified before me in February 1991 that this employee ''voluntarily quit prior to any disciplinary action as far as termination being necessary''; this record states that Armon voluntarily quit on December 18, 1989. Wampler testified that he had entered a written notation on Armon's attendance form (a notation dated November 10 or 11, 1989, and bearing Hill's at least purported signature as well as Wampler's signature) that Armon had disobeyed an order (as to the depth of a tunnel he was digging) which may have been issued by Hill, because Hill ''was anticipating possible discipline problems on [Armon]. And [Hill] was beginning to document problems that he was having with [Armon] in anticipation of terminating him.'' The representation case transcript for November 30, 1989, sets forth testimony by Wampler that Hill had hired a ''current man on his crew, Sammy Armon'' (sic). The attendance record of ''Sammie Demon Armon'' states that he started work on October 31, 1989. I infer that ''Sammy Arvon,'' ''Sammy Armon,'' and ''Sammie Demon Armon'' all refer to the same person. For demeanor reasons, I do not accept Hill's testimony that he discharged this individual, but, rather, accept the Company's records showing that Armon voluntarily quit.

Wampler testified on November 30, 1989, during the representation case hearing, that ''yesterday'' Hill had discharged W.C. Harper ''straight out,'' without consulting Hill's immediate supervisor, Ainsworth. Harper's attendance form states on its face that he was in fact fired on November 29, 1989. The back of his attendance form contains an entry, in Wampler's handwriting, which reads in part, ''11/29/89 . . . Foreman made determination [that Harper] should be terminated.'' However, neither Wampler nor Hill was asked to explain the entry which follows the above-quoted notation—which entry, in Wampler's handwriting except for Hill's at least purported signature, states, ''BEW [Wampler's initials] per L. Hill /11/10/89/ Linden Hill.''[61] Moreover, Harper's attendance sheet states that except for September 21, he worked every working day between August 30 and November 22.

In addition, Hill testified about one employee, whose name Hill could not remember, who refused to help dig a water line because he was wearing tennis shoes and did not want to get his feet wet, ''so I carried him in, and they wrote his check out''; Hill was not asked the date of this incident. Further, he testified that as to some employees on his crew, ''they will tell me they ain't going to do nothing, and I will carry them in, and let them write their checks out for them, too. But I have had a lot of them tell me they just ain't going to do nothing.''

As to employee Clark Bass, the Company's payroll records show that he was discharged on June 19, 1990. His personnel file contains a note from Wampler to the Company's payroll clerk, stating, ''You need to corner [Hill] and get his statement on Bass. I believe it was attendance, but confirm with [Hill]''; the note is undated but is written on a daily desk calendar sheet for June 27, 1990. Wampler testified that he was ''rather detached from the process other than knowing that [Bass] had been fired.'' Wampler further testified that Hill fired Bass, and that neither Wampler nor anyone else with the Company made an independent investigation as to the reasons why Bass was fired. Hill was not asked about Bass, at least by name.

Hill's connection with the discharge of David Cottrell is discussed, supra, part II,E,2,b(2)(g).

On January 23, 1990, Leonard Biggs, a laborer on Hill's crew who had missed 4 of the 11 working days that month and had been hired in early December 1989, drove up to the Company's front gate after the regular starting hour that morning. As he reached the gate, his car got stuck in the mud. He entered the Company's facility and asked Hill to use Hill's company truck to pull him out. Hill said that he would wait until after work and pull him out with Hill's own car; but Biggs said he had to get his car out right then, and headed toward the gate. Hill said, ''If you go out that gate, there is no need of coming back in.'' Wampler testified that Biggs ''went out the gate and kept going and hasn't been seen since.'' Biggs' attendance form states, in a handwriting other than Wampler's, that Biggs voluntarily quit.

My findings in the foregoing paragraph are based on a composite of credible parts of Hill's and Wampler's testimony. Because there is no evidence that Wampler overheard the Hill-Biggs conversation and because neither Hill nor Wampler so testified, I do not accept Wampler's entry on Biggs' attendance form that during this conversation Hill referred to Biggs' work and performance. In view of Wampler's quoted testimony, in the absence of corroboration by Stewart or Wampler, and because Hill's testimony suggests that he himself did not overhear these alleged conversations (although Hill's testimony in this respect was not objected to), I do not accept Hill's testimony that Biggs ''went in fussing to . . . Bo Stewart . . . and Bo told [Wampler], 'Well, whatever Hill thinks, that is what goes.'''

Hill testified that when he needs a man, Wampler tells him to hire whichever one he wants from among the applicants on the front steps (see, supra, part II,E,2,b(1)(e)). Hill testified that he follows the practice of hiring the first man who has two ''I.D.'s.'' His testimony is a bit questionable: the MESC maintains the ''I-9'' forms of the applicants sent out by it, and Wampler's testimony indicates his awareness that under such circumstances, the Company is not required to obtain any ''ID's.''[62] However, Supervisor Hayman credibly

[61] The ''declaration'' executed by Wampler on February 27, 1990, and attached to the Company's May 21, 1990, request for review of the Regional Director's Supplemental Decision and certification of representative, avers, inter alia, that on November 10, 1989, Hill reported ''a problem'' with Harper; and goes on to say that on November 29, Hill said he wanted Harper fired for showing up late and Wampler fired him. Attached to this ''declaration'' is a copy of only the first page of Harper's attendance form, which does not on its face suggest that any notations were made on the reverse side.

[62] See 8 U.S.C. § 1324a (a)(5), 8 CFR § 274a.6(c)(4).

testified that he had seen Hill pickup at least one man in this manner.

(c) *Isaiah McDonald*

Isaiah McDonald, who did not testify, was given the job description of cable foreman. Wampler testified at the November 1989 representation case hearing that McDonald ''hired David Thomas, that is one man that is on his crew now . . . when David came, [McDonald] had brought him in and wanted to hire him . . . [McDonald] recommended him, and he wanted him on his crew . . . . We hired him.'' Wampler went on to testify that when McDonald brought in Thomas, McDonald had already interviewed him; and, when asked whether Ainsworth or Stewart had interviewed Thomas, Wampler replied,'' No, there was no need to. [McDonald] wanted him and had an opening.'' Wampler further testified that McDonald ''has hired others . . . a lot of time he will bring men . . . with him when he needed crew men, and he will hire them.'' Wampler testified that as to prospective laborers brought in by the Company's laborers and driver operators, ''As far as whether or not we hired them or not, their recommendations are not very—are not based that strongly. You know, if the man is a good man, we might feel like he is a pretty reliable source. But as far as do we base it on the laborer's recommendations, no.''

Wampler's notation on the attendance sheet of David Shields, who was discharged on January 9, 1990, states that Isaiah McDonald had reported to Field Superintendent Ainsworth that Shields had refused to get into a muddy ditch; that McDonald had brought him to Ainsworth and told him ''to do what you want with [Shields], but I'm not working him''; and that Ainsworth ''turned man in to payroll for termination. As per McDonald's instruction.'' At the end of this notation Wampler put his initials and added the entry ''Per So.[63] McDonald''; under this is the date ''1–10–90'' (the day after Shields' discharge) in an unidentified hand; and under this is McDonald's purported signature. I do not credit the bona fides of the entry ''As per McDonald's instruction,'' which entry is inconsistent with the account of the incident in earlier portions of the memorandum and in Wampler's testimony, and also with the statement in Wampler's February 1990 ''declaration'' (see supra at fn. 61) that Wampler received from McDonald the message that ''he would no longer work with'' Shields. Wampler credibly testified that neither he nor Ainsworth made any independent investigation of the facts; ''it was based strictly on what [McDonald] told us.''

(d) *Lee Earl Moore*

Lee Earl Moore was given the job description of conduit foreman. He credibly testified before me in January 1991 to having ''picked out a man'' from a group of prospective employees sent down by the MESC (see, supra, part II,E,2,b(1)(e)). Supervisor Hayman credibly testified that he had seen Moore pickup at least one man up at the front. Wampler testified at the November 1989 representation case hearing that about 1985 or 1986 ''I believe'' Moore had hired two men (the Montgomery brothers) who were presently working on his crew, and that ''I know'' Moore had hired their predecessors.

Moore's testimony about his alleged connection with the selection of laborers for layoff is summarized, supra at part II,D. In view of the there discussed inconsistencies between Moore's testimony and company records, I regard his testimony as valueless in connection with selections for layoff.

As of November 1989, Moore was paid at least $1 an hour more than any other hourly paid individual in the Company's nonclerical work force, and at least twice as much as any other member of his crew. When a member of his crew wants to take time off, he asks Moore. On granting the request, as Moore has invariably done, he tells his ''boss'' that a member of his crew needs to be off.

(e) *Jewel Owens*

Jewel Owens, who did not testify, received the job description of cable foreman. Wampler testified at the representation case hearing, ''I have never known [Owens] to have a need to [fire anyone]. If he has a man today that isn't working out, [Owens] turns the heat up so hot that . . . he doesn't have to worry about firing them.'' Wampler further testified at that hearing that Owens had hired two men who subsequently quit—Wiley and Kincaid. Kincaid did not testify. At the hearing before me, Clark Wiley (the only individual referred to in the record with that surname) denied talking to Owens before Wiley reported to Owens' crew, and testified that up to that point, Wiley's entire contact was with Vice President Stewart. Because Wiley was a disinterested witness and Stewart was not asked about this matter, and for demeanor reasons, I credit Wiley. Further, for the reasons stated, supra at part II,E,2,b(1)(e), and for demeanor reasons, I do not credit Wampler's testimony that Owens hired Kincaid. See *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962).

The Company contends that Owens effectively recommended the discharge of laborer Milton Price. A composite of the Company's records and Wampler's testimony at both hearings shows as follows: Price was hired as a laborer about February 8, 1988. Probably at that time, but no later than the end of the month, he was assigned to the crew of Jewel Owens, who on an undisclosed date before the end of the month reported to his supervisor that he could get no work out of Price and recommended his transfer to a different crew. Owens' supervisor then transferred Price to the crew of admitted Supervisor Hayman, who about March 1, 1988, reported to his supervisor that Price was lazy and recommended his transfer to a different crew, but did not recommend his termination. Management then told Stafford about Owens' and Hayman's past experience with Price, and asked Stafford whether he would take Price. Stafford did so and used him until March 3, 1988. About that date, largely on the basis of the reports received by Stafford of Owens' and Hayman's experience with Price, Stafford said to his supervisor that there was no point in trying Price any more. Price was discharged on March 3, 1988. Wampler testified, inferentially in connection with unemployment compensation claims:

> On a marginal thing like that, it is basically simple misconduct. It is not what Mississippi law would consider gross misconduct. On a marginal thing like that, a lot

[63] McDonald's nickname is ''Sonny.''

of times, they will circulate it around a little bit to make sure that there is plenty enough evidence to justify the termination.

(f) *James Spiller*

As noted, supra at part II,B,4, the Company asked James Spiller to sign the job description of a cable foreman, but he refused to do so without taking the document home so that a member of his family could read it to him, and the Company refused to give him a copy.

The Company contends that Spiller effectively recommended the 1985 discharge of a member of his crew, laborer Charles Dear. Dear's attendance form states that he called in absent at 7:30 a.m. (a half hour after dispatch time) on Monday, September 9, 1985, and was ''warned.'' Spiller testified that Dear worked on Spiller's crew until a day when Dear was absent, only one other worker besides Spiller was on the crew, and three men were needed to do the job that day. Still according to Spiller, he asked for someone else (but not by name) to fill in for Dear that day, and Berry put someone else in Dear's place. Spiller went on to testify that Dear came back to work for the Company the following day, but worked with someone else until Dear left a week or two later. Dear's attendance record shows that he was fired on September 25, 1985, 12 working days after his September 9 absence; and includes the entry by Wampler: ''Fired General Indolence–Tried on two crews Spiller & Hannah w/no positive results; also inconsistent in attendance.'' Wampler corroborated Spiller's testimony that Dear at one time worked on Spiller's crew but worked on another crew (identified by Wampler as John Hannah's crew) during the period immediately before Dear left the Company's employ. However, Wampler testified that Dear was not a hard worker; ''Spiller had worked him first and didn't want to fire him, but [Spiller] turned him over to us to see if maybe we could find some other place that some other foreman might have him and give him another chance''; Hannah was willing to give Dear another try, but Hannah ''didn't have any more luck with him'' than Spiller did and recommended Dear's discharge. Spiller was an intelligent witness who admittedly knew that he would lose his discriminatory-discharge case if found to be a supervisor, and was an evasive witness as to whether he had been referred to as a ''cable foreman'' when working for the Company; see also, supra at footnote 19. However, Wampler gave internally inconsistent testimony as to other matters (see, e.g., supra at parts II,E,2,b(1)(d)(f) and (2)(a)(c), infra at part II,E,2,b(4)(e)). For demeanor reasons, as to the Dear incident I credit Spiller.

The Company contends that Spiller discharged, or effectively recommended the discharge of, laborer Johnny Ray Brown on June 2, 1989. On that day, Spiller asked Brown to use a ''Joe blade'' (a large cutting tool) to clear part of the area where Spiller's crew was laying cable. Brown said that he was not going to use the blade. Spiller said, ''Well, Johnny, this is our job, man; we supposed to work together.'' Brown said, ''I don't care . . . I ain't going to do it . . . Take me in.'' Spiller said, ''I don't want to take you in . . . I ain't got the authority to tell you what all to do. . . . I can't fight you; I have to call Mr. Stewart or Mr. Berry; have to call the office, man.'' Brown said, ''I don't care; call them and carry me in.'' Spiller said, ''If that is the way you feel, well, okay.'' Then, Spiller drove ''a piece'' in a company truck to reach a telephone, from which he reached ''a lady in the office.'' Using a shortwave radio, she called Stewart and Berry, who told her to tell Spiller to bring Brown in. When she relayed this message to Spiller, he drove back to the job site, picked up Brown, and then drove to the Company's office. On their arrival, they met with Stewart and Berry. Stewart asked Spiller what had happened. Spiller told him to talk to Brown, who said to Spiller, ''You can tell him.'' Spiller then told Stewart that Brown had told Spiller that Brown was not going to use the blade, and had told Spiller to bring him in. Spiller said that he had called Stewart because Brown had told Spiller to call Stewart and bring Brown in. Stewart said, ''Okay; I told you to bring him in . . . . You can return and go back to the job.'' Spiller did so, leaving Brown with Stewart and Berry. Spiller did not tell Stewart and Berry, nor was Spiller asked by them, what ought to happen to Brown.

My findings in the preceding paragraph are based on Spiller's testimony. Stewart was called by the Company as a witness, but was not asked about these events.[64] Wampler wrote on Brown's attendance form that on June 2, 1989, when Brown refused to carry out Spiller's directions to clear a row with a ''Joe blade,'' Spiller ''brought Brown to the office for payment of wages.'' At the representation case hearing, Wampler testified that Spiller ''brought [Brown] in and said [that] the man was being insubordinate and refusing to carry out his assigned duties, and [Spiller] wanted him terminated.'' Wampler went on to testify that ''I'' terminated Brown, and that ''I'' did not make any independent investigation of the facts before terminating him. At the hearing before me, Wampler testified that ''we'' terminated Brown because Spiller brought him in, and that Spiller ''was having some trouble with Johnny Ray Brown . . . . They was having some troubles with his discipline, and they had finally had enough of it to where he carried him in to have him terminated.'' In view of Stewart's failure to testify about this incident, the inconsistencies in Wampler's testimony about whether he alone terminated Brown, and for demeanor reasons, as to this incident I credit Spiller.[65]

The Company contends that Spiller held open the job of Clark Wiley during his absence from an off-the-job injury, and in the exercise of independent judgment hired his temporary replacement. On a date not wholly clear in the record, but probably between December 30, 1989, and January 1, 1990, inclusive, Clark Wiley, who had been working on Spiller's crew, injured his hand in an off-the-job accident. On the first working day following Wiley's accident, he came to the Company's facility and told General Manager Stewart that Wiley could not work because of his injury. Stewart told Wiley to take off and come back when his hand got better, but to bring a doctor's statement when he returned. At that

[64] The Company received a purported medical report that Berry could not safely testify because of a heart condition. I draw no inference from his failure to testify.

[65] The Company's posthearing brief to me states (p. 47) that ''Vernon Wilson Jr. was present when Johnny Ray Brown refused James Spiller's work instruction, yet General Counsel avoided examining Wilson on this subject.'' However, the record fails to show that Wilson, who operated a backhoe on the job, could overhear this Spiller-Brown conversation.

time, Wiley had no conversation with anyone but Stewart.[66] Spiller's crew ordinarily consisted of four men including him. The first morning that Wiley failed to report to work because of his injury, Spiller reported to field superintendent Berry that Spiller was short a man. Berry told him to work one man short. A day or two later, Berry told Spiller that Wiley had broken his finger and it would be a few days before he could come back. Spiller continued to work with a short crew until January 8 or 15, 1990, when his crew received a job assignment which could not be performed by a short crew. Thus, Spiller went into the office and reminded Berry and Wampler that Spiller's crew was still one man short. Wampler told him to tell one of the three men who had been sent over by the MESC, and were waiting outside on the sidewalk, to come into the office. Spiller thereupon approached them and told them that Wampler wanted to see one of them inside, and that ''they are going to hire you.'' All three thereupon went into the office. Then, Spiller went over to his truck. After the crew made the necessary preparations to drive out to the jobsite, Spiller drove the truck, with the other two crewmembers, to the front of the facility. At this point, Charles Richardson, who had been one of the three men on the sidewalk when Spiller approached them, came out and said that he too was going with the crew.[67] Spiller said, ''Fine, we need you.'' Richardson got into the truck, which proceeded to the jobsite.[68] A few days later, Berry told Spiller that Wiley had broken his finger and it would be a few days before he could come back. On February 6, 1990, Wiley returned to the Company's facility and went to the office, where Wampler and Stewart were present. Wiley said that he was now physically able to work, whereupon Stewart put him back to work. Wampler brought Wiley over to Spiller's truck, and Richardson went back with Wampler. Wiley worked with Spiller at all times thereafter until Spiller's discharge on February 28, 1990.

My findings as to the Wiley matter are based on a composite of Wiley's and Spiller's testimony, the ''replacement'' attendance form for Wiley which was offered and received into evidence (see, infra), and Spiller's personal time records for his crew.[69] As previously noted, Wiley credibly testified that his early January explanation for the injury which incapacitated him until early February was given to Stewart and not Wampler; and neither Wiley nor anyone else testified that he had been present during any conversation with Spiller (during Wiley's incapacitation) when Spiller was told (contrary to his testimony) why Wiley was absent. Wampler testified without objection, but admittedly on the basis of a memorandum on Wiley's attendance record by the Company's payroll clerk, that the Company had assumed that Wiley's absence was due to his having quit (by failing to show up) on January 2, 1990 (see, infra at fn. 70); that she had initially made such an entry on an attendance record for Wiley which was not produced at the hearing; and that on February 6, 1990, she had prepared a ''replacement record,'' which was offered and received into evidence.[70] The payroll clerk also entered on the attendance sheet for Wiley which was received into evidence the statement that the Company's conclusion that Wiley had quit on January 2 ''was due to employee's foreman failing to inform personnel office of his decision to hold employee's job open while employee recovered from an off-duty injury. First date employer was aware of employee's injury and recovery was 2–6–90 when foreman (James Spiller) reinstated the employee on his crew.'' The payroll clerk did not testify. I accept the testimony of Wiley (a disinterested witness) and Spiller rather than this handwritten entry.

(g) *Clifford Stafford*

Clifford Stafford, whom the Company called as a witness before me, received the job description of cable foreman. He testified, without contradiction or direct corroboration, that Stewart and Wampler had told him that he had the power to hire and fire; and that Wampler had told Stafford that if he was not satisfied with a man, Stafford could ''bring him in.''

Wampler testified at the representation case hearing that Stafford had fired ''several men . . . . He fired Joe Hart . . . I don't remember the [other] names right off the top of my head.'' Stafford was not asked about Hart.

The Company contends that Stafford, in the Company's interest, effectively recommended the discharge of Larry Wilson. Wilson's attendance sheet contains a notation by Wampler that Wilson was fired on February 13, 1987, for:

> Gross Misconduct. Attempted Physical [assault] upon Foreman. Mr. Cliff Stafford reported that upon harshly upbraiding the employee, the employee picked up a [shovel] and threatened to strike the foreman. . . . Law authorities called to site to remove laborer from, jobsite. Employee later transported from [illegible] by R.B. Ainsworth.

Wampler testified at the representation case hearing that Wilson

> was fired for gross misconduct. He attempted physical assault upon his foreman. His foreman reported that he was insubordinate and failing to carry out his assigned duties. The foreman kicked him off the job and had

[66] My findings as to the Wiley–Stewart conversation are based on the testimony of Wiley, a disinterested witness who voluntarily quit the Company's employ almost a year before he testified. For demeanor reasons, I do not credit Stewart's denial. Spiller corroborated Wiley's testimony that he did not talk to Spiller at this time, and there is no evidence contradicting Wiley's testimony that he did not talk to anyone else.

[67] My finding as to the date of these events is based on the fact that Spiller's personal time records show that Richardson joined the crew the Tuesday after the first week of Wiley's absence with an injury.

[68] My findings as to the circumstances surrounding Richardson's hire are based on Spiller's testimony during the General Counsel's case in chief and on rebuttal. Wampler was not asked to describe just what happened when Richardson was hired. Spiller testified that Wampler signed Richardson up and then told him to go with Spiller. However, Spiller's testimony indicates that after speaking that morning to the men on the steps, he remained outside the office.

[69] Spiller's records for his crew are consistently in error as to dates; moreover, they unexplainedly fail to include any records between those purportedly for the week ending Monday, February 5, 1990, and the week ending Monday, February 19, 1990.

[70] Laying to one side the payroll clerk's memorandum, this ''replacement record,'' interpreted in accordance with the Company's ordinary recordkeeping practices, shows that Wiley in fact worked on January 2, 1990.

him transported to our yard for termination, which we did.

Wampler went on to testify that Wilson was fired on the basis of Stafford's recommendation, and without any independent investigation. At the unfair labor practice hearing before me, Wampler testified to having been advised that Stafford called for Ainsworth ''to remove [Wilson] from the job site to where [Stafford] wouldn't have to have any further contact with him to carry him into the office.'' Wampler further testified that Ainsworth discharged Wilson because Stafford ''Throwed him off his jobsite,'' that Wampler and Ainsworth made no independent investigation to get Wilson's side of the story before he was terminated, and that Wampler based his personnel record entry on what Ainsworth told him, with Stafford's ''confirmation.'' Ainsworth and Stafford were not asked about this incident.

The Company contends that in August 1990, Stafford discharged or effectively recommended the discharge of two members of his crew—Eddie Coleman and Joe Broome. Stafford testified that when Coleman and Broome reported to the jobsite several hours late—according to Stafford's information, partly because they got lost and partly because they had been sleeping in the Company truck—''I fired them right there.'' Wampler testified that Stafford telephoned him and ''said that he [wanted to] bring them straight on in and fire them, and that is what he did''; Wampler denied making any independent investigation. At least partly on the basis of an MESC hearing attended by Wampler, he testified that Stafford discharged Coleman and Broome for ''not getting to the job site. Basically it boiled down to sleeping half the day in a truck.'' Wampler further testified that they were discharged on August 3, 1990, a Friday. Wampler's notations on their attendance sheets are dated August 3 at the top and August 6 at the bottom, and state, in part, ''Foreman fired crew members immediately. [Employees claimed] that they were not dispatched as originally stated. But foreman remained firm in his decision.''

Wampler testified before me that Stafford discharged laborer Francis Alford. Stafford testified before me that Alford had cut some existing telephone cable, thereby cutting off telephone service, and had ''covered [the cut cable] up and didn't say anything about it. And I fired him.'' Stafford went on to testify that Alford told Stafford he could not fire Alford, that Stafford told him to ''go to the office,'' that he was fired; and that Alford did not come back ''to me.'' Stafford testified in January 1991 that Alford was discharged ''last summer'' and about a month before the discharge of Coleman and Broome; the Company's personnel records show that Alford was in fact discharged on December 6, 1989, and that Coleman and Broome were discharged in August 1990. Stafford's testimony does not advert to any other incidents involving Alford. Alford's personnel records contain four separate notations by Wampler, dated between November 15 and December 6, 1989, the first three of which are signed by Stafford as well as Wampler. The first of these entries attributes to Alford the assertion to his fellow employees that Stafford was old and did not know what he was doing. The second of these, dated November 20 at the top and November 21 at the bottom, states that Alford had cut a telephone cable and told a foreman trainee on the job that they should cover it up and forget about it, thereby causing a needless service outage. The third entry, dated December 6, states that Stafford had told Alford that Stafford had heard about Alford's talking about Stafford's authority, that Alford had cut the cable and covered it up, that Alford had failed to call in when absent on December 5, and that Stafford ''sent Alford to office to be paid off.'' The fourth and last entry, also dated December 6, states that when Alford was informed of his termination, Alford stated that Stafford did not have the authority to fire Alford, and that Wampler had told Alford Stafford's decision was final. That entry goes on to state that Alford was being terminated because of his attendance record,[71] his ''repeated attempts to undermine [Stafford's] authority,'' and the damage to the telephone facilities ''in a manner to show a disregard for reasonable standards of behavior.'' After ''termination data'' Wampler wrote that Alford had been fired because of ''(1) Failure to come to work on a regular and consistent basis (2) Disregard of standards of behavior which employer has a right to expect.'' Wampler's February 27, 1990, ''declaration'' attaches the first page of Alford's attendance sheet plus most of the notations dated December 6 and states, ''On December 6, 1989, foreman Cliff Stafford told employee Frances [sic] Alford to go to the office to be paid off. Alford reported to me and I recorded his termination, without independent investigation.''

Stafford's connection with the discharge of laborer Milton Price is summarized, supra at part II,E,2,b(3)(e).

Stafford testified that if he needs someone for his crew, he approaches the applicants sent over by the MESC (see, supra at part II,E,2,b,1(e)); ''I will talk to them, see what their experience is. And if they want to work, you tell them what the situation is, what our hours is and what to expect . . . on our job.'' He testified that he had picked out an applicant that very morning (January 10, 1991) and had hired Robert Taylor as a laborer.

(4) The supervisory status vel non of individuals hired for or transferred into allegedly supervisory jobs after the March 1990 representation election

(a) *Ronald Johnson*

During the safety meeting on July 2, 1990, Ronald Johnson received, signed, and returned to the Company the job description of bore foreman. Other than the material included supra at footnote 52, the record contains no other evidence which by name treats with his status.

(b) *George Jones*

George Jones' most recent tour of duty with the Company began in March 1990. He received the job description of bore foreman, and testified that this was his title. He testified for the Company, on direct examination, that he has authority to fire, and that he had in fact fired some employees. Thereafter, as to what he meant when he said he had fired employees, he credibly described an instance where, when a man on his crew repeatedly ignored Jones' request to relieve another member of the crew, Jones drove him to the office and told Stewart that Jones did not ''need this man,'' that he did not

[71] Between January 1, 1989, and Alford's discharge on December 6, 1989, Alford missed about 2 days because of illness, 3 days because of unexcused absence, and 11 days for unknown reasons.

work, and that he set a bad example to the other crewmembers; the man was fired. In addition, Jones credibly testified that if a man was not performing the job Jones asked him to do, Jones would bring him in and advise Jones' supervisor of the situation; the employee was fired ''in many cases'' and was put on another crew in some cases. Jones further credibly testified that if men or his crew wanted time off, they would usually come to him; that he had always granted such requests and would always grant them if made ''for a legitimate reason''; and that he always reported such action to his immediate supervisor, sometimes before the employee took the time off and sometimes afterward. Also, Jones credibly testified that if he believed his crew should work beyond the regular quitting hour, he would ask his immediate supervisor, who usually permitted the crew to work late but sometimes did not.

Effective Monday, September 17, 1990, Willie Williams was transferred from Supervisor Hayman's crew to George Jones' crew.[72] Hayman testified that when his supervisor started to ''cut crews,'' it was Hayman who decided which laborers would leave his crew, and that it was Wampler or Stewart who placed them on another crew (cf. supra at part II,D).

Jones' connection with the discharge of Lavelle Graves is summarized, supra at part II,E,2,b(2)(g).

(c) *Tommie Lee Jones*

Before about June 1990, Tommie Lee Jones was a laborer who drove a truck for a cable crew led by Burkes. About June 1990, the driver for another crew (consisting of that driver and laborer Bibbs) had a falling out with South Central Bell Representatives Jean Gray and Barlow, who gave that crew its work orders. Wampler told Jones to ''swap trucks'' with the other driver and to see Barlow; Wampler said nothing regarding Jones' responsibilities as to Bibbs. Thereafter Jones has received work orders from Barlow or Gray, has driven himself and Bibbs to the job, and has worked with Bibbs in performing the job; both of them dig splice pits, put the cable up on the pedestal, and backfill the pits, and Jones usually puts up and ties off wires. The sequence in which the various jobs are performed is determined by South Central Bell.

Laying to one side the safety meeting in July 1990, no company representative has told Jones his responsibilities toward Bibbs, or that Jones had the authority to hire, fire, discipline, reprimand, transfer, promote, reward, or lay off employees, or to recommend any such action. Jones has never hired or decided to hire employees, recommended that an employee be hired, interviewed an applicant for employment, asked anyone to fill out an application, received an application for employment, written an evaluation of an employee, discharged or recommended the discharge of an employee, or asked that anyone be transferred onto or off his crew. On some occasions, Jones and Bibbs have returned to the facility 10 or 15 minutes after the usual quitting hour, without any prior authorization to work overtime. With these exceptions, these workers' overtime has been authorized in advance by Wampler. On July 5, 1990, the Company gave Jones the job description headed crew leader. He signed and returned it, but did not read it.

(d) *Charles Luckett*

Charles Luckett received, signed, and returned to the Company the job description of service wire foreman on July 2, 1990. Wampler testified that it accurately reflects Luckett's duties; for reasons set forth, infra at parts II,E,2,c(3) and 5(a), I do not credit Wampler's testimony in this respect. Wampler further testified that he reviewed this document with Luckett before he signed it, that he had no questions about it, and that he did not express any problems in connection with it. The record contains no other evidence which by name treats with his status.

(e) *Otha Lee Wilson*

According to company counsel's letter to the Union dated July 31, 1990 (supra at part II,D), Otha Lee Wilson started working for the Company in July 1976. No contention is made that he was a supervisor at any material time before March 1990. In mid-March of that year, Wampler told him that Wampler wanted to give Wilson the job of cable foreman ''over the crew.'' Wilson replied that he would feel more comfortable putting in conduit, because he knew more about it than he did cable. He eventually accepted the job of conduit foreman. In July 1990, Wampler gave him the written job description of conduit foreman, and asked him to sign it to show that Wampler had gone to the safety meeting with the workers. Wilson signed it and returned it to Wampler, but did not read it. Wilson was laid off about August 6, 1990. On his return on October 1, 1990, he was assigned to a boring crew led by George Jones. About November 1, 1990, without receiving a raise, Wilson became the leader of a service wire crew, in which capacity he was serving when he testified before me in January 1991. After March 1990, Wampler from time to time told laborers that Wilson was a foreman.

At various times, Wilson's crew included Tyrone Mitchell, Larry Smith, Michael Smith, Darren Carter, Ernest Barber, John Gary, and Smiley Stewart. Mitchell had been working with Lee Earl Moore; Wilson credibly testified that when he started putting in conduit, Moore ''let [Mitchell] come with me, because he had been working there awhile and [knew] what to do. And [Moore] told me that [Mitchell] would be a help to me.'' Wilson credibly testified, without contradiction in the received evidence, that he played no part in the hiring of Darren Carter, Ernest Barber, John Gary, or Larry Smith. As to Smiley Stewart, Wilson credibly testified that Stewart was the only applicant present that day, that Wampler told Wilson Stewart was a good man and could be put with Wilson, that ''they'' hired him, and that Wampler put him with Wilson. When Wilson's conduit crew was a man short, Wampler or vice president Stewart decided whether a laborer was available or whether to work the crew ''short''; Wilson was never asked whom he wanted to fill in.

Wilson credibly testified that on occasion, when he needed a man, Ainsworth, Berry, or Wampler would tell him to pick a man from those sent over by the MESC (see, supra at part II,E,2,b(1)(e)), and that Wilson would thereupon ''go get a man and take him in there and get him signed up''; the

[72] For reasons not shown by the record, of the two laborers on George Jones' crew as of the week ending July 28, 1990, one did not work for the Company after that week and the other did not work for the Company after the week ending August 4.

record fails to show how many people were hired in this fashion for Wilson's crew. Laying these incidents to one side, Wilson has never hired anyone or recommended that anyone be hired. Wilson has never fired anyone, disciplined anyone, laid off anyone, promoted anyone, recalled anyone, issued a written warning to anyone, or recommended that these things be done. Before the safety meeting, no supervisor or manager ever told Wilson that he had the authority to recommend firing or other discipline for the members on his crew. Laying that meeting and the associated job description to one side, there is no evidence that any supervisor or manager ever so advised Wilson.

On May 11, 1990, following a ''misunderstanding'' about whether laborer Leon Lewis had told laborer Tyrone Mitchell to pickup some pipe, Lewis told Wilson that Lewis did not want to work with Mitchell. Wilson reported this incident by telephone to Vice President Stewart, who told Wilson to bring Mitchell in. Wilson thereupon drove Mitchell back to the shop, where Wampler asked Wilson what he wanted to do. Wilson said that Wampler could put Mitchell with another crew, or ''just whatever [Wampler] wanted to do with him.'' Wilson did not say that Mitchell should be fired, and credibly testified to not knowing what happened to him. No other openings were available, and Mitchell was terminated.

My findings in the preceding paragraph are based mostly on Wilson's testimony. Wampler testified that Mitchell was fired for ''failure to carry out assigned duties,'' and that Wilson recommended Mitchell's discharge. However, Wampler wrote on the back of Mitchell's attendance record that Wilson ''said could put [Mitchell] on another crew but [Wilson] didn't want him on [Wilson's] crew.''[73]

c. *Analysis and conclusions*

(1) Individuals found to be employees in *Dickerson-Chapman I*

After considering the additional evidence received in the unfair labor practice case, I see nothing even worthy of discussion which adds anything significant to the evidence received in *Dickerson-Chapman I* as to Ben Alford, Kenneth Easterling, J. D. Freeman, James Hicks, Odess Jones, Wycliff McPherson, Harvey Miner, Tommy Obie, and Robert Taylor, all of whom *Dickerson-Chapman I* found to be statutory employees. Accordingly, I so find in the instant case.

As to all the other individuals (except Earl Howard and Vernon Wilson Jr.) whom *Dickerson-Chapman I* found nonsupervisory, I conclude that notwithstanding the credible evidence in the unfair labor practice record but not included in the record in *Dickerson-Chapman I*, the conclusions reached there are entitled to acceptance here. Thus, I conclude that Lee Field Johnson did not effectively recommend the kind of personnel action specified in Section 2(11), in the exercise of independent judgment in the Company's interest, when, on being restored to his position as cable foreman after working as a laborer because of a reduction in force, he was asked by management whether he wanted to try new men on his crew, said that he would rather have his old crew members because they had been working together all the time, and had this request honored. Nor do I believe that Pitchford effectively recommended employee Martin's discharge when Pitchford gave Wampler his ''approval to terminate'' Martin in accordance with the recommendation of Wampler, Pitchford's immediate superior. Further, I do not think that Joe L. Smith effectively recommended the discharge of employee Graves, in the Company's interest and in the exercise of independent judgment, when Smith told Wampler (a few minutes after Jones had suggested Graves' transfer from Jones' crew to another crew and Smith, in urgent need of a man, had agreed to try Graves on his crew) that Graves had refused to go out that day and Smith had no use for him. Similarly, I do not think Smith effectively recommended the discharge of laborer Cottrell when Smith asked for another man after Cottrell, whose transfer to Smith's crew had just been accepted by Smith because he badly needed a man, said that he did not want to work that morning because of the rain.

Because the complaint does not allege that the Company directed any unfair labor practices toward James Wade in November 1989, at a time when the Company had assigned to him the job title of ''driver/foreman,'' whether he was then a statutory supervisor is immaterial to the instant case. In any event, as to his status at that time I see nothing in the unfair labor practice record which adds anything significant to the evidence in *Dickerson-Chapman I*, when he was found to be a statutory employee. In addition, I conclude that Wade occupied employee status after he acquired the classification of ''pole foreman'' in March 1990. At that time, Wade took over the job of Kenneth Easterling, whom *Dickerson-Chapman I* found to be an employee. The only evidence adduced before me, but not in *Dickerson-Chapman I* in connection with Wade's predecessor Easterling, is the June 1990 incident where Wampler discharged laborer Charles Williams upon Wade's request that Williams be removed from Wade's jobsite because Williams had hit him with a shovel. I conclude that Wade made this request in his own interest in personal physical safety on the job, rather than in the Company's interest as required by Section 2(11).

However, I do find that in May 1990, after the representation election, Howard effectively recommended the discharge of Watson because of his continuing tardiness and absence problem, and that this recommendation was made in the Company's interest and in the exercise of independent judgment. In addition, I find that Vernon Wilson Jr. on several occasions after the close of the representation case hearing selected laborers for hire from the group sent over by the MESC, in the Company's interest and in the exercise of independent judgment. Because all parties agree that Howard's and Wilson Jr.'s status did not change at any material time before July 1990,[74] I find that as of November 1989

[73] Farther down on Mitchell's attendance record, Wampler stated: Wilson brought [Mitchell] to office for disciplinary action as stated above. [Mitchell] was immediately terminated based upon Wilson's statement. Wilson had told Mr. Stewart about his decision prior to bringing [Mitchell] in. Mr. Stewart told Wilson, ''[You're] the boss, do what you need to do.''
Stewart was not asked about this incident, and Wampler's entries quoted in this footnote do not agree very well with his earlier entries quoted in the text.

[74] Wilson was given the job description of ''conduit foreman'' in November 1989 (although be refused to sign it) and in July 1990. Although he worked as a backhoe operator, without leading a crew, between October 30, 1989, and mid-February 1990, no contention is

they were supervisors within the meaning of Section 2(11). Accordingly, they will be excluded from the certified bargaining unit. *Serv-U-Stores*, supra, 234 NLRB at 1144.[75]

(2) Individuals whose status was litigated but left undetermined in *Dickerson-Chapman I*

I find that in June 1990 Burkes discharged or effectively recommended the discharge of employee Gaines, in the Company's interest and in the exercise of independent judgment; and, therefore, that Burkes was at all relevant times a supervisor within the meaning of Section 2(11). I also so find as to Hill, on the basis of his June 1990 discharge of employee Bass and the evidence that Hill selects new laborers from among the applicants on the front steps. On the basis of similar selections for hire made by Lee Earl Moore, I find that he too was a statutory supervisor. On the basis of similar selections for hire made by Stafford, and because in August 1990 he discharged employees Coleman and Broome in the Company's interest and in the exercise of independent judgment, I further find that Stafford was a statutory supervisor. Furthermore, I find that McDonald was a statutory supervisor because he had authority effectively to recommend the hire of laborers, in the Company's interest and in the exercise of independent judgment.

However, I find that Jewel Owens' connection with laborer Price's discharge—namely, recommending his transfer to a different crew, from which he was transferred before being discharged—was not sufficient to render Owens a statutory supervisor, and that Owens was a statutory employee. See *Magnolia Manor Nursing Home*, 260 NLRB 377, 385 (1982).

Remaining for consideration is the status of James Spiller. About a month before discharging him for union activity, and after Spiller's crew had received a work assignment which could only be performed with a full crew, Wampler answered Spiller's most recent reminder that the crew was short by telling him to tell one of the three men who were waiting on the front steps to come into the office. I accept Spiller's at least seeming inference that Wampler was asking Spiller to select the man who would likely be hired for his crew to fill in for the injured Wiley; in the event, Spiller disassociated himself from the hiring process, and the probative evidence fails to show who else selected Richardson from the men on the steps. I conclude that this incident is insufficient to show that Spiller was a statutory supervisor. Although Spiller led a cable crew for 12 years before his discharge, this was the only occasion on which the Company even purported to give him any say as to which laborers were to be added to his crew. See *Lloyd's Ornamental & Steel Fabricators*, 197 NLRB 367, 372 (1972), enfd. 486 F.2d 1407 (8th Cir. 1973). *Dickerson-Chapman I* found that a similar incident was insufficient to render McPherson a supervisor.[76] Moreover, I question the bona fides of Wampler's purported effort to invest Spiller with hiring authority on this occasion. In addition to the fact that this was the only such occasion in 12 years, I note that the Company's sole defense to its action in discharging Spiller for union activity a month or so later is his alleged supervisory status, and that Spiller had refused to sign the kind of inaccurate document on which the Company has relied to support its claim that a number of its workers are not entitled to the protection of the statute—including two workers (McPherson and Odess Jones) who were discharged for union activity about 3 months before Spiller.

(3) Individuals hired for or transferred into allegedly supervisory jobs after the representation election

As found, infra, the job descriptions issued in July 1990 were in material part issued, not for the purpose of accurately reflecting the recipients' duties, but to create a paper basis to support the Company's contention that the recipients were statutory supervisors; and were issued in violation of Section 8(a)(1) and (3) of the Act. Accordingly, in determining the supervisory status vel non of those individuals who were hired for or transferred into allegedly supervisory jobs after the representation election, such job descriptions are entitled to no weight. Laying these documents to one side, there is no credible evidence that Ronald Johnson, Tommie Lee Jones, or Charles Luckett was a supervisor at any material time. Further, I conclude that George Jones did not exercise supervisory authority in reporting to management the perceived deficiencies in the work performance of the laborers on his crew, without (so far as the record shows) making any recommendation about what should be done with them; and that Jones was a statutory employee. See *Magnolia Manor*, supra, 260 NLRB at 385.

However, I conclude that Otha Lee Wilson had the authority to select laborers for hire, in the Company's interest and in the exercise of independent judgment; and that, therefore, he is a supervisor within the meaning of Section 2(11) of the Act.

3. Whether the Company violated Section 8(a)(1) and (3) of the Act by ''promoting'' certain individuals in November 1989

In support of the contention that the Company unlawfully ''promoted'' certain individuals in November 1989, the General Counsel solely alleges that the Company was unlawfully motivated in issuing job descriptions. Because no job descriptions were issued in November 1989 to Earl Howard, Elijah Pitchford, and Joe L. Smith, and because Howard was in any event a statutory supervisor, this portion of the complaint will be dismissed as to them. This portion of the complaint will also be dismissed as to Burkes, Hill, McDonald, Stafford, and Vernon Wilson Jr. in view of my finding that they occupied supervisory status.

As to the remaining portions of this complaint allegation, the initial question is the Company's motive in issuing the job descriptions. I agree with the General Counsel that the Company issued these job descriptions for the purpose of providing a paper basis for the Company's contention that the recipients were statutory supervisors and, therefore, would have to be excluded from any unit sought by the Union. Thus, from the very outset of the union campaign the Company has attempted to keep its personnel from being

made that his status before November 1989 differed from his status after mid-February 1990.

[75] Because the Company admittedly challenged any ballots which may have been cast by Howard and Wilson Jr. (see, supra at part II,A), my finding that they were not employees as found in *Dickerson-Chapman I* does not affect the results of that election.

[76] See p. 25 of the Regional Director's Decision and Direction of Election.

union represented. The Company discharged, admittedly for union activity, three employees who had received such job descriptions and were active in the union campaign, has sought to defend such discharges on the ground that the dischargees were supervisors, and has used these job descriptions to support that contention. The Company sought to prevent the Union's May 1990 certification, and refused to bargain with the Union until at least the court of appeals' July 1992 enforcement of the Board's bargaining order, on the grounds that the recipients of these job descriptions (as well as other individuals on the Company's payroll) were statutory supervisors. These job descriptions were drawn up partly by the attorney whom the Company had consulted for advice on how to fight the Union and how to keep it out. The Company had not drafted any job descriptions for the proceeding 10 years or (so far as the record shows) at any previous time, and has never explained why it chose to draft them at this particular time. The Company used these job descriptions in the representation case hearing to support its contention that the recipients should be excluded from the unit as supervisors. When Spiller declined to sign a job description immediately, on the ground that he was unable to read it, the Company failed to comply with his request for a copy which he could take home to have read to him by his family, and fired him, admittedly for union activity, about 2-1/2 months later. When McPherson tried to withdraw his signature, which he had put on the document in the mistaken belief that it was an evaluation form, the Company refused to let him withdraw his signature and fired him the following day, admittedly for union activity. Finally, these job descriptions made misstatements, as to the individuals' real powers, which if accepted would support the Company's position that these individuals were in fact supervisors; see *Dickerson-Chapman I*, supra, 964 F.2d at 498 fn. 6. Accordingly, I find that the Company violated Section 8(a)(1) and (3) of the Act by issuing these job descriptions to employees Ben Alford, Kenneth Easterling, J. D. Freeman, James Hicks, Lee Field Johnson, Odess Jones, Wycliff McPherson, Harvey Miner, Tommy Obie, Jewel Owens, James Spiller, and Robert Taylor.[77]

4. Whether the Company violated Section 8(a)(1) and (3) by interrogating and discharging employees

As previously noted, the Company admits that its discharge of McPherson, Odess Jones, and Spiller for union activity violated the Act if they were statutory employees. Having found that they occupied that status, I find that by discharging them, the Company violated Section 8(a)(1) and (3).

In addition, I find that the Company violated Section 8(a)(1) of the Act by Vice President Stewart's interrogation of Odess Jones and McPherson about November 3, 1989, and by Wampler's interrogation of Spiller on February 16, 1990. In finding that such interrogation about union activity violated Section 8(a)(1), I note that at the end of each such interview, the employee was told that he was being discharged for union activity; that each such interview took place in the office customarily used by top management but not by the interrogated employee, to which he had been summoned for purposes of the interview; that Stewart was the top ranking member of management who regularly worked at the facility; that during the McPherson and Jones interviews, two other top ranking members of management were also present; that all three employees were asked about union meetings, their attendance at such meetings, and their own plans about whether to engage in union activity in the future; that McPherson and Jones were asked to name other employees who were union activists; and that McPherson gave what Wampler characterized as evasive replies. See *NLRB v. Brookwood Furniture*, 701 F.2d 452, 460–463 (5th Cir. 1983); *Whitewood Maintenance Co.*, 292 NLRB 1159, 1164 (1989), enfd. 928 F.2d 1426 (5th Cir. 1991); *Midland Transportation Co.*, 304 NLRB 4 (1991).

However, I see nothing in the record to support the allegation in the amended April 1990 complaint that Stewart unlawfully interrogated an employee in March 1990. That allegation will be dismissed.

5. Whether the Company's unilateral conduct in July 1990 violated the Act

a. *The 8(a)(3) and (1) allegations*

As previously noted, in early July 1990, about 6 weeks after the Union's initial vain request to the Company to honor the certification, the Company issued new job descriptions to all of the individuals whom it classified as foremen and crew leaders. The job descriptions issued to the crew leaders, who had never previously received job descriptions, stated, inter alia, that the crew leader had the authority to hire laborers to fill vacancies on his crew; to recommend reassignment or discharge of unsatisfactory laborers; and to discharge immediately any laborer on his crew for gross misconduct or safety violations. None of this authority is referred to in a job description for crew leaders which Wampler drew up in the fall of 1989, and which (Wampler testified in January 1991) shows ''the crew leader's basic duties . . . as long as I have been with the Company.''[78] The job descriptions issued in July 1990 to individuals whom the Company classified as bore foremen, pole foremen, conduit foremen, service wire foremen, and cable foremen all included a section headed ''Personnel Responsibilities'' which stated that the foreman had authority to hire laborers to fill vacancies on his crew; was responsible to assure adequate crew manning when laborers failed to report for work; was expected to recommend reassignment or discharge of unsatisfactory crewmembers; had the authority to determine to work overtime, up to 2 hours, to complete a job; was responsible for the morale and discipline of his crew; was expected to recommend reassignment or discharge of unsatisfactory crewmembers; had the authority to discharge immediately

[77] *Pilot Freight Carriers*, 221 NLRB 1026, 1028–1029 (1975), enf. denied on other grounds 558 F.2d 205 (4th Cir. 1977); *Venture Packaging*, 294 NLRB 544, 552–553 (1989), enfd. 923 F.2d 855 (6th Cir. 1991); *Regency Manor Nursing Home*, 275 NLRB 1261, 1277 (1985).

[78] At the representation case hearing, when asked the reason for this omission, Wampler testified, ''Probably because it just didn't occur to me at the time.'' He further testified that he was not aware of any situation in the past 12 years where crew leaders recommended discipline or discharge, and that the authority to discipline had not been ''expressly'' conveyed to the crew leaders, ''But if they so chose to, we would very likely adhere to whatever they expressed.''

any member of his crew for gross misconduct or safety violations; and was expected to direct his crew's work so as to minimize labor costs as a percentage of job revenue. All of these functions except the last two had been set forth in the job descriptions given out in November 1989 with respect to all such ''foremen'' except bore foremen, whom the Company did not then have in its employ.

I agree with the General Counsel that the issuance of the July 1990 job descriptions did not have the effect of rendering statutory supervisors those individuals who had previously been employees, including those whom I have found to be employees before July 1990 and most of whom were found to be employees in *Dickerson-Chapman I*. Thus, the Company's brief to me states (p. 34) that laying the ''competent-person'' functions to one side, the Company's ''foremen and crew leaders continued to exercise the same authority . . . in the same way they had before.''[79] Moreover, Wampler testified that as to the July 1990 job descriptions of conduit foreman, pole foreman, and service wire foreman, the OSHA responsibilities were the only additions to the November 1989 job descriptions, which *Dickerson-Chapman I* found did not establish supervisory status. Further, after the issuance of the July 1990 job descriptions, Wampler testified that the crew foremen had had the same basic duties since he had been with the Company. Moreover, I conclude that the responsibilities set forth in the July 1990 job descriptions under the heading ''Safety Responsibilities'' did not, even on their face, constitute responsibilities which would create a statutory supervisor. The ''Safety Responsibilities'' most arguably of a supervisory nature are that the subject of the job description ''shall not permit any employee to remain under a load handled by lifting or digging equipment''; that employees are to be ''required to stand away from any vehicle being loaded or unloaded to avoid being struck by any spillage or falling materials''; and that employees are not to be ''allowed'' to enter excavations ''in which the atmosphere contains a concentration of a flammable gas in excess of 20 percent of the lower flammable limit of the gas,'' or to enter without respirators excavations ''with an atmospheric content of less than 19.5 percent.'' I do not think that the performance of these duties would require responsible direction in the exercise of independent judgment even if the designated ''competent persons'' understood what they were supposed to do and the Company had furnished respirators and atmospheric testing devices, none of which it in fact provided.

Further indicating that July 1990 job descriptions did not create supervisory status is the evidence from which I conclude, in agreement with the General Counsel, that the Company issued them for the purpose of causing the Board to reach on the basis of creative paper the erroneous conclusion that certain individuals, who were in fact statutory employees, were instead statutory supervisors who were not entitled to the protection of the Act; and, therefore, that the issuance of these portions of the job descriptions violated Section 8(a)(1) and (3) of the Act (see cases cited, supra at fn. 77). I so find because the Company attempted over a period of years to escape a bargaining obligation on the ground that many of the persons on its payroll were statutory supervisors; because the Company used these July 1990 job descriptions in an effort to induce the Board to refrain from issuing a bargaining order and the court of appeals from enforcing that order; because as to a number of the employee recipients the July 1990 job descriptions repeated misrepresentations in the November 1989 job descriptions; because, although as to the crew leaders the July 1990 job descriptions set forth responsibilities which appear on their face to be supervisory in character, such responsibilities were not set forth in the 1989 job descriptions never issued to the crew leaders and Wampler testified that crew leaders' basic responsibilities had never changed; because the Company issued the July 1990 job descriptions to be signed by the foremen and crew leaders (some of them at a very low level of literacy) under circumstances where some of them would be unlikely to read them before signing them; and because in November 1989 the Company had issued job descriptions for the same unlawful purpose. Accordingly, I find that the Company violated Section 8(a)(1) and (3) of the Act about July 2, 1990, by issuing job descriptions to employees J. D. Freeman, James Hicks, Lee Field Johnson, Ronald Johnson, Tommie Lee Jones, Charles Luckett, Harvey Miner, Tommy Obie, Jewel Owens, Elijah Pitchford, Joe L. Smith, Robert Taylor, and James Wade. In view of my finding that William Burkes, Linden Hill, Earl Howard, Isaiah McDonald, Lee Earl Moore, Clifford Stafford, Otha Lee Wilson, and Vernon Wilson Jr. were statutory supervisors, this portion of the complaint will be dismissed as to them.

However, I do not agree with the General Counsel that the July 1990 wage increases to the employee recipients of the July 1990 job descriptions were motivated by a desire to discourage union activity. Wampler testified that these increases were given mostly in order to compensate for the recipients' new safety responsibilities. The General Counsel may be contending that these increases violated Section 8(a)(3) because they either were an admitted consequence of safety responsibilities which were allegedly assigned for the purpose of discouraging union activity, or were part of a plan to discourage union activity by assigning safety responsibilities and concomitant wage increases. I conclude that the evidence fails preponderantly to support either theory. To be sure, Wampler was at best inaccurate in testifying that the Company selected the foremen and crew leaders to act as ''competent persons'' under OSHA regulations because they were the only ones who had the requisite ''authority''; Wampler, Stewart, Ainsworth, and Berry obviously possessed the requisite ''authority,'' and Wampler's use of that term evinces his anxiety to show as much ''authority'' as possible by the foremen and crew leaders. Moreover, the Company included the new ''Safety Responsibilities'' in job descriptions whose issuance violated Section 8(a)(1) and (3). Furthermore, I infer that the Company must have known that the instructions given by Wampler as to the duties of a ''competent person'' were incompletely understood by a significant number of the workers who underwent this instruction. Nevertheless, the Company's top managers would likely have found it difficult, if not impossible, to perform inspections of all jobsites at the times called for by OSHA regulations. Moreover, the foremen and crew leaders were on the jobsite at all relevant times, and the Company could at least reasonably and honestly have believed that by virtue of experience, they were likely the crew members best qualified to act as ''com-

[79] Similarly, the General Counsel's brief states (p. 73) that ''job duties did not change after the July [1990] job descriptions were signed.''

petent persons'' and that their relative stability on the job would limit the Company's need to train new ''competent persons.'' I am doubtful whether the General Counsel has made out a prima facie Section 8(a)(3) case with respect to the ''competent-person'' designations and related wage increases; but assuming that she has done so, I find that the record preponderantly shows that the Company would have named the foremen and crew leaders as ''competent persons'' even if a desire to make them appear to be supervisors was a factor in the Company's decision thus to name them.

b. *The 8(a)(5) allegations*

An employer violates Section 8(a)(5) of the Act by making unilateral changes with respect to a mandatory subject of collective bargaining without informing the employees' statutory bargaining representative of the employer's proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals. *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983), rehearing en banc denied 715 F.2d 1020 (5th Cir. 1983); see also *Litton Business Systems v. NLRB*, 111 S.Ct. 2215, 2221 (1991). Although the Union was certified on May 9, 1990, and on May 22 asked the Company to bargain with it, the Company failed to give the Union any prior notice (or, for that matter, any notice until August 3 at the earliest) of the Company's July 1990 unilateral action in issuing new job descriptions which included the performance of ''competent-person'' functions in response to OSHA regulations, giving wage increases to these new ''competent persons,'' and issuing a safety-manual rule which forbids unit employers to undertake certain relatively deep excavations without the permission of an ''excavation safety officer'' or a plan designed by a registered professional engineer. I find that all of these unilateral actions were taken with respect to mandatory subjects of collective bargaining.

It is true that longstanding OSHA regulations required the designation of ''competent persons'' with certain capabilities and authorizations. However, the identity of the individuals who were to be assigned such duties was a mandatory subject of collective bargaining, because this assignment added to the duties of certain unit employees and, moreover, the safety conditions of the entire unit were affected by whether the individuals who were designated ''competent persons'' really possessed the capabilities required by OSHA. See *Everbrite Electric Signs*, 222 NLRB 679, 682–683, 685 (1976), enfd. 562 F.2d 405 (7th Cir. 1977); *Woods Schools*, 270 NLRB 171, 176 (1984); *Christopher Street Owners Corp*., 294 NLRB 277, 281–282 (1989); *NLRB v. Gulf Power Co*., 384 F.2d 822, 824–825 (5th Cir. 1967); *Northside Center for Child Development*, 310 NLRB 105 (1993); *North American Soccer League*, 245 NLRB 1301, 1306–1307 (1979), and cases cited. While it is true that for a number of years OSHA regulations had required the Company to designate ''competent persons,'' these regulations did not excuse the Company from its duty to bargain as to who would be so designated. *J. P. Stevens & Co*., 239 NLRB 738, 742–743 (1978), enfd. in relevant part 623 F.2d 322 (4th Cir. 1980), cert. denied 449 U.S. 1077 (1981); *Kendall College of Art*, 292 NLRB 1065, 1066–1067 (1989); *Seiler Tank Truck Service*, 307 NLRB 1090 (1992). In view of the Company's continuing contention that supervisory status was possessed by all the individuals who were the subject of these unlawful unilateral changes, the Company's August 3 offer to bargain with respect to the effect of these changes ''on employees'' did not satisfy, even as to the mandatorily bargainable matters which were the subject of the Company's July 1990 unilateral action, the bargaining opportunity to which the Union was entitled. See *Specialized Living Center*, 286 NLRB 511 (1987), enfd. 879 F.2d 1442, 1455 (7th Cir. 1989).

6. Whether the Company's unilateral conduct in August 1990 violated Section 8(a)(5) and (1) of the Act

As shown, supra at part II,D in August 1990 the Company laid off or severely curtailed the hours of certain employees, for the expressed reason that the Company was experiencing a drastic decline in work orders. As the Company does not appear to dispute, whether a layoff for such reasons should be effected, whom to include in any such layoff, and what if any benefits should be given to laid-off employees in connection with any such layoff, are mandatory subjects of collective bargaining. *Adair Standish Corp. v. NLRB*, 912 F.2d 854, 864–866 (6th Cir. 1990); *NLRB v. Litton Business Systems*, 893 F.2d 1128, 1133–1135 (9th Cir. 1990), cert. denied so far as relevant here 111 S.Ct. 426 (1990), rev. in part as to issues irrelevant here, 111 S.Ct. 2215 (1991); *Stamping Specialty Co*., 294 NLRB 703 (1989); *Paramount Poultry*, 294 NLRB 867, 869 (1989); *McCotter Motors Co*., 291 NLRB 764 (1988); *Lapeer Foundry & Machine*, 289 NLRB 952 (1988). Accordingly, the Company could not lawfully effect such action without informing the Union of the Company's proposed actions under circumstances which afforded a reasonable opportunity for counter arguments or proposals. *Gulf States*, supra, 704 F.2d at 1397; *NLRB v. Pinkston-Hollar Construction Services*, 954 F.2d 306, 311–312 (5th Cir. 1982). No such timely notice was given by the Company. Rather, the Company laid off three individuals (two of whom were admittedly employees) at 7 a.m. on the day after the Company first advised the Union of its intention to effect a layoff, and laid off four more individuals (three of whom were admittedly employees) effective the very day that the parties were scheduled to meet for a discussion about the matter.

The Company's contention that its action was not unlawful because it accorded with prior practice is obviously irrelevant to the Company's failure to give the Union timely notice of the decision to effect a layoff; Wampler testified that the Company had previously effected only one layoff (for undisclosed reasons) in the preceding 12 years, circumstances hardly consistent with the existence of a recurring and essentially identical problem which had regularly been resolved in a recurring and identical fashion. Furthermore, the record shows that any system which may have been used by the Company in selecting which employees would be laid off was not the system previously used by the Company. Thus, according to Wampler, during the prior layoff no foremen or crew leaders were laid off and the foremen reduced each crew by one. However, during the 1990 layoff, three foremen were laid off (two of whom the Board had already found to be nonsupervisory), all the members of Vernon Wilson Jr.'s crew were laid off, and the laid-off employees included three from Abel's crew and two from Obie's crew. Moreover, admitted Supervisor Hayman's testimony indicates that it was Wampler or Stewart who decided whether particular laborers

were to be transferred to other crews or to be laid off. Company counsel's July 31 letter to the Union that the ''past practice in similar situations'' had been to withhold dispatch from selected crews as units[80] cannot be squared with either Wampler's testimony, with company counsel's statement before me that particularly good laborers were picked up by other foremen and those that were not picked up were surplussed, or with whatever system the Company did follow in 1990. Only the members of the crew headed by Vernon Wilson Jr. were all put on a continuous 1-hour-per-day ''show-up'' basis. Cable Foreman Lee Field Johnson was the only member of his crew put on a continuous showup basis; the other members continued to work on a relatively full-time basis while Johnson was receiving 5 hours' pay a week. Moreover, while ''service wire foreman'' Otha Lee Wilson was still on a showup basis, laborer Barber, who had been on Wilson's crew, was recalled and worked for 2 weeks before Wilson was recalled.[81]

I find unmeritorious the Company's contention that its unilateral conduct in connection with the ''surplussing'' was not unlawful because the Company was at the time contesting (in the event, unsuccessfully) the validity of the Union's certification and during the August 6 conference the Union declined to discuss the layoff issue except as part of contract negotiations. In refusing to honor the certification, the Company proceeded at its own risk. *NLRB v. Laney & Duke Storage Warehouse Co*., 369 F.2d 859, 869 (5th Cir. 1966); *Unifirst Corp*., 280 NLRB 75, 76 fn. 1 (1986).[82] The Company having been unsuccessful in taking that risk, the certification from the date of its issuance precluded the Company from requiring the Union to choose between piecemeal bargaining or none. *Specialized Living*, supra, 286 NLRB 511, 879 F.2d at 1455–1457.[83] The Company's contention that it could not have bargained meaningfully about issues other than the layoff, because the Board had failed to determine whether 7 individuals were included in a bargaining unit which otherwise consisted of about 47 employees, is inconsistent with the action of the court in *Dickerson-Chapman I* in requiring the Company to ''bargain with the Union on terms and conditions of employment, and, if an understanding is reached, embody the understanding is a signed agreement [but] this Judgment does not require [the Company] to bargain with [the Union] concerning [the] terms and conditions of employment'' of these seven individuals.

Particularly because the validity of the May 1990 certification has been upheld at all stages of litigation,[84] I fail to understand why the Company's brief regards as ''useful'' to the Company a proposed analogy between the instant case and the rule that an employer acts at its peril in making unilateral changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has yet been made.[85]

> If the employer's objections are rejected, its duty to bargain relates back to the date of the election, and the employer's unilateral actions while objections were pending are automatic violations of § 8(a)(5) . . . an employer whose election objections are overruled must bargain retroactively about all post-election changes, thus restoring the duty-to-bargain status quo as of the date of the election. [*Dow Chemical Co. v. NLRB*, 660 F.2d 637, 653–655 (5th Cir. 1981), and cases cited in fn. 13; see also *Specialized Living*, supra, 879 F.2d at 1455–1457.]

In the case at bar, the Company's unilateral conduct in connection with the layoff occurred after the certification had issued. The Company seems to be contending that the *Mike O'Connor* rule was developed in order to discourage employers from postponing bargaining obligations by filing spurious challenges to an election and prevent employers from boxing the union in on future bargaining positions by implementing changes of policy and practice during the certification contest; that neither of these policy considerations is present here because ''the Board's decision on review of the Decision and Direction of Election conceded that the [Company's] arguments are serious and substantial [and the Company] attempted to negotiate its lay off plan with the Union''; that, therefore, in the instant case even *Mike O'Connor's* restrictions on unilateral action would have been inapplicable to the Company's conduct in connection with the layoff if it had occurred before the certification; and that, therefore, these alleged exceptions to *Mike O'Connor's* restrictions on precertification unilateral conduct also extend to the Company's postcertification conduct in connection with the layoff. As to postcertification unilateral conduct, *Specialized Living*, supra, 879 F.2d at 1456, rejected the contention that such unilateral conduct is privileged even by the ''compelling-economic-considerations'' exception specifically articulated in *Mike O'Connor* as to the precertification period. Accordingly, I need not and do not determine whether, as to precertification unilateral conduct, *Mike O'Connor* is subject to the additional exceptions urged by the Company, or whether the existence of such exceptions is shown by the in-

[80] Rather similarly, the Company's posthearing brief to me states (p. 58), ''The crews were dispatched, or not, with their foremen. The dispatch order was arranged by the most objective measure of the value [the Company] placed on each foreman's skills—his pay rate.'' I note, however, that the layoff included the Wilsons, who were receiving $8.50 an hour, but not McDonald, Hill, Burkes, or Obie, all of whom were paid between $7 and $8 an hour. Although the Wilsons were classified as conduit foremen and the rest as cable foremen, in March 1990 the Company had offered Otha Lee Wilson a job as a cable foreman before acceding to his request to give him a job as a conduit foreman instead.

[81] In view of this variance between the system described in counsel's July 31 letter and what the Company in fact did, I am doubtful whether the letter would have constituted adequate notice to the Union even if the letter had otherwise been sufficient to meet the Company's statutory obligations.

[82] See also *NLRB v. Winn-Dixie Stores*, 361 F.2d 512, 515–516 (5th Cir. 1966), cert. denied 385 U.S. 935 (1966); Sec. 3(b) of the Act (''a review [by the Board] shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the Regional Director''); Secs. 102.67(b) and 102.69(c)(4) of the Board's Rules and Regulations.

[83] See also *E. I. du Pont & Co*., 304 NLRB 792 fn. 1 (1991); *Sacramento Union*, 291 NLRB 552, 556 (1988). In *Pinkston*, supra, relied on by the company, the employer did not display willingness to bargain on a piecemeal basis only; see 954 F.2d at 307–308.

[84] The Company's brief to me was filed after the Board had issued its bargaining order in *Dickerson-Chapman I*, but before the court's enforcement of that order.

[85] The Company relies on *Mike O'Connor Chevrolet-Buick-GMC Co*., 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1985).

stant record.[86] I conclude that the Company violated Section 8(a)(5) and (1) of the Act about August 1, 1990, by laying off or severely cutting back the hours of employees without giving the Union prior notice and an opportunity to bargain.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Company has violated Section 8(a)(1) of the Act about November 3, 1989, by interrogating employees Odess Jones and Wycliff McPherson about union activity, and on February 28, 1990, by interrogating employee James Spiller about union activity.

4. The Company has violated Section 8(a)(1) and (3) of the Act by the following conduct:

(a) Giving employees pay raises about November 1989.

(b) Issuing job descriptions about November 2, 1989, to the following employees: Ben Alford, Kenneth Easterling, J. D. Freeman, James Hicks, Lee Field Johnson, Odess Jones, Wycliff McPherson, Harvey Miner, Tommy Obie, Jewel Owens, James Spiller, and Robert Taylor.

(c) Discharging Odess Jones about November 3, 1989; Wycliff McPherson about November 3, 1989; and James Spiller on February 28, 1990.

(d) Issuing job descriptions about July 2, 1990, to the following employees: J. D. Freeman, James Hicks, Lee Field Johnson, Ronald Johnson, George Jones, Tommie Lee Jones, Charles Luckett, Harvey Miner, Tommy Obie, Jewel Owens, Elijah Pitchford, Joe L. Smith, Robert Taylor, and James Wade.

5. The following employees of the Company constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time operational service personnel, including operators, laborers, drivers, operator/drivers, crew leaders (except Earl Howard), maintenance employees, driver/foremen, foremen/trainee, service wire foremen (except Otha Lee Wilson and Linden Hill), pole foremen, conduit foremen (except Lee Earl Moore and Vernon Wilson Jr.), cable foremen (including Jewel Owens and James Spiller, but not including William Burkes, Isaiah McDonald, and Clifford Stafford) employed by the Company and working at its Jackson, Mississippi facility; excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

6. At all times since May 9, 1990, the Union by virtue of Section 9(a) of the Act has been, and is, the exclusive representative of the unit described in Conclusion of Law 5 for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

7. The Company has violated Section 8(a)(5) and (1) of the Act in the following respects:

(a) About July 2, 1990, without giving the Union prior notice and an opportunity to bargain, by unilaterally taking the following action:

(1) Appointing personnel as, and giving them the duties of, ''competent persons.''

(2) Issuing new job descriptions, and giving wage increases, to the employees named in Conclusion of Law 4.

(3) Issuing new safety regulations with respect to unit employees.

(b) About August 1, 1990, by laying off or severely cutting back the hours of unit employees.

8. The unfair labor practices set forth in Conclusions of Law 3, 4, and 7 affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. The Company has not violated the Act by interrogating an employee about March 13, 1990; by issuing job descriptions about November 2, 1989, to William Burkes, Linden Hill, Earl Howard, Isaiah McDonald, Lee Earl Moore, Elijah Pitchford, Joe L. Smith, Clifford Stafford, and Vernon Wilson Jr.; or by issuing job descriptions and giving wage increases about July 2, 1990, to William Burkes, Linden Hill, Earl Howard, Isaiah McDonald, Lee Earl Moore, Clifford Stafford, Otha Lee Wilson, and Vernon Wilson Jr.

10. The Company has not violated Section 8(a)(3) of the Act by appointing ''competent persons'' and giving wage increases in July 1990.

THE REMEDY

Having found that the Company has violated the Act in certain respects, I shall recommend that the Company be required to cease and desist from the unfair labor practices found, and from like or related conduct, and to take certain affirmative action necessary to effectuate the policies of the Act. Thus, the Company will be required to offer reinstatement to the jobs of which they were unlawfully deprived—or, if such jobs no longer exist, substantially equivalent jobs—to Odess Jones, Wycliff McPherson, James Spiller, and the employees whose layoffs became effective between August 1 and 23, 1990, without prejudice to their seniority or other rights and privileges they would have enjoyed if they had not been discharged or laid off. This reinstatement order does not extend to employees who have already been offered reinstatement. However, the reinstatement order includes the laid-off employees who have not received reinstatement offers but whom General Counsel's Exhibit 40 lists as having voluntarily quit.[87] On the record before me, there is no way of determining whether these resignations were due to the economic position in which the Company's unlawful layoff action had placed them; see *Big Sky Sheet Metal Co.*, 266 NLRB 21 (1983); *C. K. Smith & Co.*, 227 NLRB 1061, 1075 (1977) (Wadowski). Under these circumstances, whether they have voluntarily relinquished their right to a re-

[86] It would be impossible to determine from the instant record, which was closed in February 1991, the extent (if any) to which the Company's unilateral August 1990 conduct in connection with the layoff boxed in the Union with respect to the parties' bargaining positions following the July 1992 judicial enforcement of the bargaining order. I note, moreover, that after the Board's July 1990 denial of the Company's request for review of the certification, the Company never thereafter reiterated its March 1990 objections to conduct affecting the result of the election.

[87] The employees there listed as having voluntarily quit are James Blackwell; Clark Thompson; Charlie Williams; Darren Carter; Michael Smith; Jessie James; Alfred Willis; Nelse Ellington; Wesley Martin; Emils Pollard; and Angelo Stamps.

instatement offer will be left to the compliance stage of these proceedings.[88] In addition, the Company will be required to make such employees, and the employees whose hours were curtailed in connection with that layoff, whole for any loss of pay they may have suffered by reason of such discharge, layoff, or curtailment of hours, to be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as called for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Also, the Company will be required to remove the November 1989 job descriptions from the files of the following employees, and advise such employees (except the deceased Kenneth Easterling) in writing that this has been done: Ben Alford, Kenneth Easterling, J. D. Freeman, James Hicks, Lee Field Johnson, Odess Jones, Wycliff McPherson, Harvey Miner, Tommy Obie, Jewel Owens, James Spiller, and Robert Taylor.

Furthermore, the Company will be required, on the Union's request, to take the following action:

(1) Remove from the files of the following employees the job descriptions (except for the portions headed ''Safety Responsibilities'') issued on July 2, 1990, and advise such employees in writing that this has been done: J. D. Freeman, James Hicks, Lee Field Johnson, Ronald Johnson, George Jones, Tommie Lee Jones, Charles Luckett, Harvey Miner, Tommy Obie, Jewel Owens, Elijah Pitchford, Joe L. Smith, Robert Taylor, and James Wade.

(2) Cancel the wage increases given to such employees on July 2, 1990; but nothing in this Order shall require the Company to take such wage action without the Union's request.

(3) Delete from the safety manuals issued on July 2, 1990, the portion directed to the Company's excavation permit policy.

Because OSHA regulations require the Company to employ designated ''competent persons,'' this Order will not require the Company to honor any request by the Union to alter such designations or the associated provisions in the designees' job descriptions. However, the Company will be required to bargain with the Union, on request, as to the identity of such designees, and as to their training and duties consistent with the requirements of OSHA regulations. Further, the Company will be required to bargain with the Union, on request, as to the matters encompassed by the Company's unlawful unilateral action in July 1990.

Although *Dickerson-Chapman I* led to the issuance of a general bargaining order, the judgment issued by the court of appeals does not require the Company to bargain with the Union as to Jewel Owens and James Spiller, both of whom have been found in the instant proceeding to be statutory employees. Accordingly, a general bargaining order including them will be issued here. See *Chicago Educational Television Assn*., 308 NLRB 102 fn. 1 (1992).

Also, the Company will be required to post appropriate notices. Because a number of the Company's employees are virtually illiterate, it is appropriate to add the additional requirement that the notice be read to the employees. The Company can fulfil this requirement by permitting the notice to be read by a Board agent or, after giving a Board agent the opportunity to be present, by having a company agent or permitting a union agent to read the notice.[89]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[90]

ORDER

The Respondent, Dickerson-Chapman, Inc., Jackson, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about union activity in a manner constituting interference, restraint, or coercion.

(b) Discouraging membership in International Union of Operating Engineers, AFL–CIO, Local 624, AFL–CIO, by increasing wages, by issuing job descriptions, by discharging employees, or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

(c) Refusing to bargain with Local 624 as the exclusive-bargaining representative of the employees in the bargaining unit.

(d) Unilaterally appointing personnel as, and giving them the duties of, ''competent persons''; issuing job descriptions for unit employees; giving unit employees wage increases; issuing new safety regulations with respect to unit employees; laying off or severely cutting back the hours of unit employees; or otherwise changing unit employees' rates of pay, wages, hours of employment, or other conditions of employment; without giving Local 624 prior notice and an opportunity to bargain.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act.

2. Take the following action necessary to effectuate the policies of the Act.

(a) Offer reinstatement to the jobs of which they were unlawfully deprived or, if such jobs no longer exist, substantially equivalent jobs, to Odess Jones, Wycliff McPherson, James Spiller, and the employees whose layoffs became effective between August 1 and August 23, 1990, without prejudice to their seniority or other rights and privileges they would have enjoyed if they had not been discharged or laid off.

(b) Make such employees, and the employees whose hours were curtailed in connection with that layoff, whole for any loss of pay they may have suffered by reason of their unlaw-

[88] Vernon Wilson Jr., the only witness thus listed as having voluntarily quit, testified that after being ''surplussed'' on August 1 he reported to work every morning, and received 1 hour's pay for each day, until he obtained a job elsewhere; he received 19.5 hours' pay from the Company for the week ending August 4, 5 hours' pay for each week between the weeks ending August 11 and the week ending September 1, 9 hours' pay for the week ending September 8 (which included Labor Day), and nothing thereafter. This evidence at least suggests that he may have ''voluntarily quit'' because his income from the Company after he was ''surplussed'' was not enough to live on.

[89] The notice is phrased in the arguably esoteric language customarily used by the Board. However, the employees are likely to understand the posted notice better if it is also read to them.

[90] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ful discharge, layoff, or curtailment of hours, in the manner set forth in that part of the remedy section of this decision.

(c) Remove the November 1989 job descriptions from the files of the following employees, and advise such employees (except the late Kenneth Easterling) that this has been done: Ben Alford, Kenneth Easterling, J. D. Freeman, James Hicks, Lee Field Johnson, Odess Jones, Wycliff McPherson, Harvey Miner, Tommy Obie, Jewel Owens, James Spiller, and Robert Taylor.

(d) On Local 624's request, take the following action:

(1) Remove from the files of the following employees the job descriptions (except for the portions headed ''Safety Responsibilities'') issued about July 2, 1990, and advise such employees in writing that this has been done: J. D. Freeman, James Hicks, Lee Field Johnson, Ronald Johnson, George Jones, Tommie Lee Jones, Charles Luckett, Harvey Miner, Tommy Obie, Jewel Owens, Elijah Pitchford, Joe L. Smith, Robert Taylor, and James Wade.

(2) Cancel the wage increases given to such employees about July 2, 1990; but nothing in this Order shall require Respondent to take such wage action without Local 624's request.

(3) Delete from the safety manuals issued on July 2, 1990, the portion regarding the excavation permit policy.

(e) On request, bargain with Local 624 as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time operational service personnel, including operators, laborers, drivers, operator/drivers, crew leaders (except Earl Howard), maintenance employees, driver/foremen, foremen/trainee, service wire foremen (except Otha Lee Wilson and Linden Hill), pole foremen, conduit foremen (except Lee Earl Moore and Vernon Wilson Jr.), cable foremen (including Jewel Owens and James Spiller, but not including William Burkes, Isaiah McDonald, and Clifford Stafford) employed by the Company and working at its Jackson, Mississippi facility; excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facilities in Jackson, Mississippi, copies of the attached notice marked ''Appendix.''[91] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaints are dismissed to the extent they allege unfair labor practices not previously found.

[91] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate you about union activity in a manner constituting interference, restraint, or coercion.

WE WILL NOT discourage membership in International Union of Operating Engineers, AFL–CIO, Local 624, by increasing wages, by issuing job descriptions, by discharging employees, or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT refuse to bargain with Local 624 as the exclusive bargaining representative of the employees in the bargaining unit.

WE WILL NOT unilaterally appoint personnel as and give them the duties of ''competent persons,'' issue job descriptions for unit employees, give unit employees wage increases, issue new safety regulations with respect to unit employees, lay off or severely cut back the hours of unit employees, or otherwise change unit employees' rates of pay, wages, hours of employment, or other conditions of employment, without giving Local 624 prior notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the Act.

WE WILL offer reinstatement to the jobs of which they were unlawfully deprived or, if such jobs no longer exist, substantially equivalent jobs, to Odess Jones, Wycliff McPherson, James Spiller, and the employees whose layoffs became effective between August 1 and August 23, 1990, without prejudice to their seniority or other rights and privileges they would have enjoyed if they had not been discharged or laid off.

WE WILL make these employees, and the employees whose hours were curtailed in connection with that layoff, whole, with interest, for any loss of pay they may have suffered by reason of their unlawful discharge, layoff, or curtailment of hours.

WE WILL remove the November 1989 job descriptions from the files of the following employees: Ben Alford, Kenneth Easterling, J. D. Freeman, James Hicks, Lee Field Johnson, Odess Jones, Wycliff McPherson, Harvey Miner, Tommy Obie, Jewel Owens, James Spiller, and Robert Taylor.

On Local 624's request, WE WILL:

1. Remove from the files of the following employees the job descriptions (except for the portions headed ''Safety Responsibilities'') issued about July 2, 1990: J. D. Freeman, James Hicks, Lee Field Johnson, Ronald Johnson, George Jones, Tommie Lee Jones, Charles Luckett, Harvey Miner, Tommy Obie, Jewel Owens, Elijah Pitchford, Joe L. Smith, Robert Taylor, and James Wade.

2. Cancel the wage increases given to such employees about July 2, 1990; but nothing in this Order requires us to take such wage action without Local 624's request.

3. Delete from our safety manuals issued on July 2, 1990, the portion regarding the excavation permit policy.

WE WILL, on request, bargain with Local 624 in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time operational service personnel, including operators, laborers, drivers, operator/drivers, crew leaders, maintenance employees, driver/foremen, foremen-trainee, service wire foremen, pole foremen, conduit foremen, cable foremen employed by us and working at our Jackson, Mississippi facility; excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

DICKERSON-CHAPMAN, INC.